(22,562.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 941.

W. H. COYLE, PLAINTIFF IN ERROR,

vs.

THOMAS P. SMITH, SECRETARY OF STATE OF THE STATE OF OKLAHOMA, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 18, 1911.

1 W. H. COYLE, Plaintiff,

vs.

THOMAS P. SMITH, Secretary of State of the State of Oklahoma, et al., Defendants.

Return to Writ of Error.

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereto subscribe my name, and affix the seal of said Supreme Court of the State of Oklahoma, in the City of Oklahoma City, this 22nd day of February, 1911.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk of the Supreme Court of the State of Oklahoma.
By JESSIE PARDOE, *Deputy.*

2 UNITED STATES OF AMERICA, *ss:*

Citation.

The President of the United States to Thomas P. Smith, Secretary of State of the State of Oklahoma; E. D. Cameron, Superintendent of Public Instruction of the State of Oklahoma; M. E. Trapp, State Auditor of the State of Oklahoma; J. A. Menafee, State Treasurer of the State of Oklahoma; C. A. Taylor, Examiner and Inspector of the State of Oklahoma; Charles Daugherty, Commissioner of Labor of the State of Oklahoma; Kate Barnard, Commissioner of Charities and Corrections of the State of Oklahoma; J. E. Love, A. P. Watson and J. J. McAlester, Corporation Commissioners of the State of Oklahoma; J. J. Quarles, A. J. Allen and J. T. Dickerson, composing the State Board of Public Affairs of the State of Oklahoma; Charles West, Attorney General of the State of Oklahoma; Milas Lasater, Commissioner of Insurance of the State of Oklahoma; Seth Cordon, W. J. Leahy and Jake Hammon, composing the State Election Board of the State of Oklahoma; E. B. Cockrell, Bank Commissioner of the State of Oklahoma; and Frank M. Canton, Adjutant General of the State of Oklahoma, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in

the Clerk's office of the Supreme Court of the State of Oklahoma, wherein W. H. Coyle is Plaintiff in Error, and you are Defendants in Error, to show cause, if any there be, why the judgment rendered against the said Plaintiff in Error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John B. Turner, Chief Justice of the Supreme Court of the State of Oklahoma, this 14th day of February, in the year of our Lord One Thousand Nine Hundred and Eleven.

JOHN B. TURNER,
Chief Justice of the Supreme Court of the State of Oklahoma.

Attest:

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk Supreme Court of the State of Oklahoma.
By JESSIE PARDOE, *Deputy.*

3 OKLAHOMA CITY, OKLAHOMA, *February* 14, 1911.

We, attorneys of record for the Defendants in Error in the above entitled cause, hereby acknowledge due service of the above Citation, and enter an appearance in the Supreme Court of the United States.

W. CHEVES,
Assistant Attorney General,
W. A. LEDBETTER,
C. B. STUART,
B. F. BURWELL,
Attorneys for Defendants in Error.

[Endorsed:] #2225. Citation and service thereof. Filed Feb. 14, 1911. W. H. L. Campbell, Clerk.

4 UNITED STATES OF AMERICA,
State of Oklahoma:

W. H. COYLE, Plaintiff,

vs.

THOMAS P. SMITH, Secretary of State of the State of Oklahoma; E. D. Cameron, Superintendent of Public Instruction of the State of Oklahoma; M. E. Trapp, State Auditor of the State of Oklahoma; J. A. Menafee, State Treasurer of the State of Oklahoma; C. A. Taylor, Examiner and Inspector of the State of Oklahoma; Charles Daugherty, Commissioner of Labor of the State of Oklahoma; Kate Barnard, Commissioner of Charities and Corrections of the State of Oklahoma; J. E. Love, A. P. Watson, and J. J. McAlester, Corporation Commissioners of the State of Oklahoma; J. J. Quarles, A. J. Allen, and J. T. Dickerson, Composing the State Board of Public Affairs of the State of Oklahoma; Charles West, Attorney General of the State of Oklahoma; Milas Lasater, Commissioner of Insurance of the State of Oklahoma; Seth Cordon, W. J. Leahy, and Jake Hammon, Composing the State Election Board of the State of Oklahoma; E. B. Cockrell, Bank Commissioner of the State of Oklahoma, and Frank M. Canton, Adjutant General of the State of Oklahoma, Defendants.

Application for Writ of Error.

To the Honorable John B. Turner, Chief Justice of the Supreme Court of the State of Oklahoma:

The petition of W. H. Coyle respectfully shows that on the 9th day of February, A. D. 1911, the Supreme Court of the State of Oklahoma rendered a final judgment and decree against your petitioner in a certain cause wherein W. H. Coyle was plaintiff, and Thomas P. Smith, Secretary of State of the State of Oklahoma, E. D. Cameron, Superintendent of Public Instruction of the State of Oklahoma, M. E. Trapp, State Auditor of the State of Oklahoma, J. A. Menafee, State Treasurer of the State of Oklahoma, C. A. Taylor, Examiner and Inspector of the State of Oklahoma,
5 Charles Daugherty, Commissioner of Labor of the State of Oklahoma, Kate Barnard, Commissioner of Charities and Corrections of the State of Oklahoma, J. E. Love, A. P. Watson and J. J. McAlester, Corporations Commissioners of the State of Oklahoma, J. J. Quarles, A. J. Allen and J. T. Dickerson, composing the State Board of Public Affairs of the State of Oklahoma; Charles West, Attorney General of the State of Oklahoma, Milas Lassater, Commissioner of Insurance of the State of Oklahoma, Seth Cordon, W. J. Leahy and Jake Hammon, composing the State Election Board of the State of Oklahoma, E. B. Cockrell, Bank Commissioner of the State of Oklahoma, and Frank M. Canton, Adjutant General of the State of Oklahoma, were defendants, sustaining a demurrer to plaintiff's petition and dismissing his plea or petition, and rendering judgment against him for costs in said cause, as will appear by reference to the record and proceedings in said cause; and that said court is

the highest court of said State in which a decision in said suit could be had. And your petitioner claims the right to remove said judgment and decree to the Supreme Court of the United States by writ of error, under Section 709 of the Revised Statutes of the United States, because:

First. There was drawn in question in said suit and in the judgment and decree rendered therein the validity of a treaty and statute of the United States, and the decision was against their validity.

Second. Because there was drawn in question in said suit and in the judgment and decree rendered therein the validity of a statute and an authority exercised under a statute of the State of Oklahoma on the ground of its being repugnant to the Constitution, treaties and laws of the United States, and the decision was in favor of the validity of said State statute.

Third. Because in said suit and in the bill and petition filed therein a certain title, right, privilege and immunity was
6 claimed by the plaintiff under the Constitution, treaties and laws of the United States, and especially under the Act of Congress of June 16, 1906, entitled, "An Act to enable the people of Oklahoma and of the Indian Territory to form a constitution and state government and be admitted into the Union on an equal footing with the original states, and to enable the people of New Mexico and Arizona to form a constitution and state government and be admitted into the Union on an equal footing with the original states," which said title, right, privilege and immunity were specially set up and claimed by the plaintiff under the said Constitution, treaty, and authority, and the decision in said suit was and is against the said title, right, privilege and immunity.

Fourth. Because the decision of the Court in said suit denied and denies to the plaintiff the equal protection of the laws, in violation of the Constitution of the United States.

Fifth. Because the decision in said suit deprives the plaintiff of his property without due process of law and contrary to the law of the land.

Sixth. Because the decision of the Court in said suit is based and predicated upon a statute of the State of Oklahoma, and said statute of said State impairs the obligation of a compact and contract entered into between the United States of America and the people of the State of Oklahoma, which statute is violative of that provision of the Constitution of the United States which forbids any State to pass any law impairing the obligation of a contract, as appears by the record of the proceedings in said cause which is herewith submitted.

Wherefore, Your petitioner prays the allowance of a writ of error returnable into the Supreme Court of the United States, and for citation and supersedeas, and your petitioner will ever pray.

7

W. H. COYLE, *Petitioner.*
FRANK DALE,
C. G. HORNOR,
BURFORD & BURFORD,
Attorneys for Petitioner.

The writ of error as prayed for in the foregoing petition is hereby allowed this 14th day of February, A. D., 1911, and bond is fixed at the sum of One Thousand Dollars.

JOHN B. TURNER,
Chief Justice of the Supreme Court of the State of Oklahoma.

Attest:

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL, *Clerk,*
By JESSIE PARDOE, *Deputy.*

Filed in my office this 14" day of February, A. D., 1911.

W. H. L. CAMPBELL.
Clerk Supreme Court of the State of Oklahoma,
By JESSIE PARDOE, *Deputy.*

[Endorsed:] #2225. Filed Feb. 14, 1911. W. H. L. Campbell, Clerk.

8 In the Supreme Court of the United States.

W. H. COYLE, Plaintiff in Error,

vs.

THOMAS P. SMITH, Secretary of State of the State of Oklahoma; E. D. Cameron, Superintendent of Public Instruction of the State of Oklahoma; M. E. Trapp, State Auditor of the State of Oklahoma; J. A. Menafee, State Treasurer of the State of Oklahoma; C. A. Taylor, Examiner and Inspector of the State of Oklahoma; Charles Daugherty, Commissioner of Labor of the State of Oklahoma; Kate Barnard, Commissioner of Charities and Corrections of the State of Oklahoma; J. E. Love, A. P. Watson, and J. J. McAlester, Corporation Commissioners of the State of Oklahoma; J. J. Quarles, A. J. Allen, and J. T. Dickerson, Composing the State Board of Public Affairs of the State of Oklahoma; Charles West, Attorney General of the State of Oklahoma; Milas Lasater, Commissioner of Insurance of the State of Oklahoma; Seth Cordon, W. J. Leahy, and Jake Hammon, Composing the State Election Board of the State of Oklahoma; E. B. Cockrell, Bank Commissioner of the State of Oklahoma, and Frank M. Canton, Adjutant General of the State of Oklahoma, Defendants in Error.

Assignment of Errors.

Now comes W. H. Coyle, the said Plaintiff in Error, and respectfully submits that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Oklahoma, in the above entitled matter, there is manifest error in this, to wit:

First. The Court erred in sustaining the demurrer of the defendants to plaintiff's petition.

Second. The Court erred in dismissing plaintiff's petition
9 and rendering judgment against him for costs.

Third. The Court erred in holding that the statute enacted by the State of Oklahoma, entitled, "An Act providing for the permanent location of the Seat of Government and Capital of the State of Oklahoma, Creating a board of Capital Commissioners and defining its powers and duties, Authorizing the Governor to accept for Capital purposes the proceeds of the sale of land or donations from other sources, and declaring an emergency," is not repugnant to the Act of Congress providing for and prescribing the conditions of the admission of the State of Oklahoma into the Union, known as the Enabling Act, and in deciding in favor of the validity of said State statute.

Fourth. The Court erred in deciding against the validity of the statute of the United States known as the Enabling Act, approved June 16, 1906, and entitled, "An Act to enable the people of Oklahoma and of the Indian Territory to form a constitution and state government and be admitted into the Union on an equal footing with the original states, and to enable the people of New Mexico and Arizona to form a constitution and state government and be admitted into the Union on an equal footing with the original states."

Fifth. The Court erred in deciding that the legislature of the State of Oklahoma had and has the power to locate the permanent capital of the State of Oklahoma prior to the year 1913.

Sixth. The Court erred in deciding that the permanent location of the capital of the State of Oklahoma is a proper subject for legislative action.

Seventh. The Court erred in deciding that the terms of the Act of Congress relating to the admission of Oklahoma as a State, wherein it is provided:

"The capital of said State shall temporarily be at the City
10 of Guthrie, in the present Territory of Oklahoma, and shall not be changed therefrom previous to Anno Domini Nineteen hundred and thirteen, but said capital shall, after said year, be located by the electors of said State at an election to be provided for by the legislature; Provided, however, that the legislature of said State, except as shall be necessary for the convenient transaction of the public business of said State at said capital, shall not appropriate any public moneys of the State for the erection of buildings for capital purposes during such period."

And the further provision of said Act to the effect:

"That the constitutional convention provided for herein shall by ordinance irrevocable, accept the terms and conditions of this Act."

followed by the adoption by the constitutional convention on the 22nd day of April, 1907, of an irrevocable ordinance adopting all the terms and conditions of said Act of Congress, in the terms following:

"Be it ordained by the Constitutional Convention for the proposed State of Oklahoma, that said Constitutional Convention, do by this ordinance irrevocable, accept the terms and conditions of an Act

of Congress of the United States, entitled, 'An Act to Enable the People of Oklahoma and Indian Territory, to form a Constitution and State Government, and be admitted into the Union on an equal footing with the Original States; and to Enable the people of New Mexico and Arizona to form a Constitution and State Government and be admitted into the Union on an equal footing with the Original States,' approved June Sixteenth, Anno Domini, Nineteen Hundred and Six."

do not constitute a compact between the people of the State of Oklahoma and the United States, which cannot be repudiated or nullified by the State legislature during the period limited, and in deciding that said Enabling Act and ordinance irrevocable constitute a law of no higher character or greater force than an ordinary legislative enactment, and that the same may be repealed by the legislature at will.

Eighth. The Court erred in deciding that the plaintiff is not entitled to immunity from taxation to provide revenues for payment of salaries of a state capital commission to locate the permanent capital of the State prior to the year 1913, such immunity being claimed under the provisions of an Act of Congress prohibiting the
11 State from locating its capital until after 1913, and prohibiting the appropriation of any public moneys for capital purposes during such period.

Ninth. The Court erred in deciding that the statute of the State providing for the location of the State capital is not repugnant to that provision of the Constitution which prohibits any State from passing any law impairing the obligation of a contract, and in deciding in favor of the validity of said statute.

Tenth. The Court erred in deciding that Congress has no power to prescribe conditions for the admission of new states, requiring the people of such proposed state to waive any of their political powers, and in deciding against the validity of the Act of Congress imposing such restrictions upon the State of Oklahoma as a condition precedent to its admission.

Wherefore, Plaintiff in Error prays that the decision of said State Court be set aside, vacated and held for naught, and that said cause be remanded with directions to reinstate the same and grant the relief prayed for in the petition.

W. H. COYLE, *Pl'nt'f in Error.*
FRANK DALE,
C. G. HORNOR,
BURFORD & BURFORD,
Attorneys for Plaintiff in Error.

[Endorsed:] #2225. Filed Feb. 14, 1911. W. H. L. Campbell, Clerk.

12 UNITED STATES OF AMERICA,
State of Oklahoma:

W. H. COYLE, Plaintiff,
vs.
THOMAS P. SMITH, Secretary of State of the State of Oklahoma, et al., Defendants.

Order Allowing Writ.

The above entitled matter coming on to be heard upon the petition of the appellant herein for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Oklahoma, and upon examination of said petition and the record in said matter, and desiring to give the petitioner an opportunity to present in the Supreme Court of the United States the questions presented by the record in said matter;

It is ordered that the writ of error be, and is hereby, allowed to this Court from the Supreme Court of the United States, and that the bond presented by said petitioner be and the same is hereby approved.

JOHN B. TURNER,
Chief Justice of the Supreme Court of the State of Oklahoma.

Attest:
W. H. L. CAMPBELL, *Clerk,*
By JESSIE PARDOE, *Deputy.*

[SEAL.]
Copy.

[Endorsed:] Filed Feb. 14, 1911. W. H. L. Campbell, Clerk.

13 *Writ of Error.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Oklahoma, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Supreme Court of the State of Oklahoma before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit, between W. H. Coyle, plaintiff, and the defendants Thomas P. Smith, Secretary of State of the State of Oklahoma, E. D. Cameron, Superintendent of Public Instruction of the State of Oklahoma, M. E. Trapp, State Auditor of the State of Oklahoma, J. A. Menafee, State Treasurer of the State of Oklahoma, C. A. Taylor, Examiner and Inspector of the State of Oklahoma, Charles Daugherty, Commissioner of Labor of the State of Oklahoma, Kate Barnard, Commissioner of Charities and Corrections of the State of

Oklahoma, J. E. Love, A. P. Watson and J. J. McAlester, Corporation Commissioners of the State of Oklahoma, J. J. Quarles, A. J. Allen and J. T. Dickerson, composing the State Board of Public Affairs of the State of Oklahoma, Charles West, Attorney General of the State of Oklahoma, Milas Lasater, Commissioner of Insurance of the State of Oklahoma, Seth Cordon, W. J. Leahy and Jake Hammon, composing the State Election Board of the State of Oklahoma, E. B. Cockrell, Bank Commissioner of the State of Oklahoma, and Frank M. Canton, Adjutant General of the State of Oklahoma, wherein was drawn in question the validity of a treaty and statute of and an authority exercised under the United States, and the decision was against their validity; and wherein was drawn in question the validity of a statute of and an authority exercised under
14 said State on the ground of their being repugnant to the Constitution, treaties and laws of the United States, and the decision was in favor of such their validity; and wherein was drawn in question the construction of a clause of the Constitution and of a treaty and statute of the United States, and the decision was against the title, right, privilege and immunity specially set up and claimed under such clause of the said Constitution, treaty and statute, a manifest error hath happened to the great damage of the said W. H. Coyle, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., on the 16th day of March, 1911, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness, The Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, the 14th day of February, in the year of our Lord One Thousand Nine Hundred and Eleven.

Issued at office in Guthrie, with the seal of the Circuit Court of the United States for the Western District of Oklahoma, and
15 dated as aforesaid.

[The Seal of the Circuit Court of the United States, Western District of Oklahoma.]

HARRY L. FINLEY,
Clerk of the Circuit Court of the United States for the Western District of Oklahoma.

Allowed February 14th, 1911.

JOHN B. TURNER,
Chief Justice of the Supreme Court of the State of Oklahoma.

[Endorsed:] #2225. Filed Feb. 14, 1911. W. H. L. Campbell, Clerk.

16 *Copy of Bond.*

In the Supreme Court of the State of Oklahoma.

W. H. COYLE, Plaintiff in Error,

vs.

THOMAS P. SMITH, Secretary of State of the State of Oklahoma; E. D. Cameron, Superintendent of Public Instruction of the State of Oklahoma; M. E. Trapp, State Auditor of the State of Oklahoma; J. A. Menafee, State Treasurer of the State of Oklahoma; C. A. Taylor, Examiner and Inspector of the State of Oklahoma; Charles Daugherty, Commissioner of Labor of the State of Oklahoma; Kate Barnard, Commissioner of Charities and Corrections of the State of Oklahoma; J. E. Love, A. P. Watson, and J. J. McAlester, Corporation Commissioners of the State of Oklahoma; J. J. Quarles, A. J. Allen, and J. T. Dickerson, Composing the State Board of Public Affairs of the State of Oklahoma; Charles West, Attorney General of the State of Oklahoma; Milas Lasater, Commissioner of Insurance of the State of Oklahoma; Seth Cordon, W. J. Leahy, and Jake Hammon, Composing the State Election Board of the State of Oklahoma; E. B. Cockrell, Bank Commissioner of the State of Oklahoma, and Frank M. Canton, Adjutant General of the State of Oklahoma, Defendants in Error.

Bond.

Know all men by these presents: That we, W. H. Coyle, as Principal, and N. C. Guss and Robt. Sohlberg, as Sureties, are held and firmly bound unto the Defendants in Error above named, in the sum of One Thousand Dollars, to be paid to the said obligees, their successors, representatives and assigns, for the payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this 14th day of February, A. D., 1911.

17 Whereas, The above named Plaintiff in Error hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Oklahoma.

Now, Therefore, The condition of this obligation is such that if the above named Plaintiff in Error shall prosecute his said writ of error to effect, and answer all costs and damages, if he shall fail to make good his plea, then this obligation shall be void, otherwise to remain in full force and effect.

W. H. COYLE.
N. C. GUSS.
ROBT. SOLHBERG.

STATE OF OKLAHOMA,
County of Logan, ss:

On this 14th day of February, 1911, before me personally appeared W. H. Coyle, to me known to be the person described in and who executed the foregoing bond, and acknowledged that he executed the same as his free act and deed.

[Seal George Tipton, Notary Public, Logan Co., Okla.]

GEORGE TIPTON,
Notary Public.

My Commission expires Sept. 19, 1914.

STATE OF OKLAHOMA,
County of Logan, ss:

On this 14th day of February, A. D., 1911, personally appeared before me, Robt. Sohlberg and N. C. Guss, who being duly sworn, depose and say that they are *each* bona fide residents of Logan County, Oklahoma, and that they are each worth the sum of Two Thousand Dollars over and above their debts, liabilities and
18 exemptions.

N. C. GUSS.
ROBT. SOHLBERG.

Subscribed and sworn to before me February 14, 1911.

[SEAL.] GEORGE TIPTON,
Notary Public.

My Commission expires —— 19, 1914.

I hereby approve the foregoing bond and sureties this 14th day of February, 1911.

JOHN B. TURNER,
Chief Justice of the Supreme Court of the State of Oklahoma.

[Endorsed:] #2225. Filed Feb. 14, 1911. W. H. L. Campbell, Clerk.

19 In the Supreme Court of the State of Oklahoma.

No. 2225.

W. H. COYLE, Plaintiff,

vs.

THOMAS P. SMITH, Secretary of State of the State of Oklahoma; E. D. Cameron, Superintendent of Public Instruction of the State of Oklahoma; M. E. Trapp, State Auditor of the State of Oklahoma; J. A. Menafee, State Treasurer of the State of Oklahoma; C. A. Taylor, Examiner and Inspector of the State of Oklahoma; Charles Dougherty, Commissioner of Labor of the State of Oklahoma; Kate Bernard, Commissioner of Charities and Corrections of the State of Oklahoma; J. E. Love, A. P. Watson, and J. J. McAlester, Corporation Commissioners of the State of Oklahoma; J. J. Quarles, A. J. Allen, and J. T. Dickerson, Composing the State Board of Public Affairs of the State of Oklahoma; Charles West, Attorney General of the State of Oklahoma; Milas Lassater, Commissioner of Insurance of the State of Oklahoma; Seth Cordon, W. J. Leahy, and Jake Hammon, Composing the State Election Board of the State of Oklahoma; E. B. Cockrell, Bank Commissioner of the State of Oklahoma, and Frank M. Canton, Adjutant General of the State of Oklahoma, Defendants.

Petition.

20 The plaintiff, complaining of the defendants, suggests to the court in limine that the matters and things involved in this action are publici juris, and as such are of great interest and concern to the State and to the people of the State. That this action is instituted under the provisions of an Act of the legislature, approved December 7, 1910, purporting to confer upon the Supreme Court exclusive jurisdiction of actions of this character; that there is a question whether the Court has jurisdiction to entertain the suit, by reason of the fact that the special session of the legislature at which the Act in question was passed was held at Oklahoma City and not at Guthrie, the seat of government of said State, as required by the Constitution, and on account of the doubtful validity of the assembly which held such session as well as for other reasons. The plaintiff desires to invoke the jurisdiction of this court if it has jurisdiction to hear and determine this case, and subject to said jurisdictional question and without prejudice to his right to proceed elsewhere and otherwise if this Court is without jurisdiction:

The plaintiff alleges, that he is a citizen and elector of the United States and of the State of Oklahoma, and that he is a resident and tax payer of the County of Logan, State of Oklahoma.

That the defendant Thomas P. Smith is the regularly appointed, qualified and acting Secretary of State of the State of Oklahoma; that the defendant E. D. Cameron is the duly elected and acting Superintendent of Public Instruction of the State of Oklahoma; that

the defendant M. E. Trapp is the duly elected and acting State Auditor of the State of Oklahoma; that the defendant J. A. Menafee is the duly elected and acting State Treasurer of the State of Oklahoma; that the defendant C. A. Taylor is the duly elected and acting Examiner and Inspector of the State of Oklahoma; that the defendant Charles Daugherty is the duly elected and acting
21 Commissioner of Labor of the State of Oklahoma; that the defendant Kate Bernard is the duly elected and acting Commissioner of Charities and Corrections of the State of Oklahoma; that the defendants J. E. Love, A. P. Watson and J. J. McAlester are the duly elected, qualified and acting Corporation Commissioners of the State of Oklahoma; that J. J. Quarles, A. J. Allen and J. T. Dickerson are the duly appointed, qualified and acting members of the State Board of Public Affairs; that the defendant Charles West is the duly elected, qualified and acting Attorney General of the State of Oklahoma; that the defendant Milas Lassater is the duly appointed, qualified and acting Commissioner of Insurance of the State of Oklahoma; that the defendant Seth Cordon, W. J. Leahy and Jake Hammon are the duly appointed, qualified and acting members of the State Election Board of the State of Oklahoma; that the defendant E. B. Cockrell is the State Bank Examiner of the State of Oklahoma; that the defendant Frank M. Canton is the duly appointed, qualified and acting Adjutant General of the State of Oklahoma.

That the seat of government of the State of Oklahoma is now and has been since the admission of said State into the Union at the City of Guthrie in the County of Logan.

That it is provided in Section 1, Article Six, of the Constitution of the State of Oklahoma, that:

"The executive authority of the State shall be vested in a Governor, Lieutenant Governor, Secretary of State, State Auditor, Attorney General, State Treasurer, Superintendent of Public Instruction, State Examiner and Inspector, Chief Mine Inspector, Commissioner of Labor, Commissioner of Charities, and Corrections, Commissioner of Insurance and other officers provided by law and this Constitution, each of which shall keep his office and public records, books and papers at the seat of government and shall perform such duties as may be designated in this constitution or prescribed by law."

That pursuant to said requirements the defendants and all other State officers have since the admission of said State into the Union, kept their offices and public records, books and papers at the City of Guthrie, the temporary seat of government, and have trans-
22 acted all official duties at said place continuously until this date. That all the regular legislative sessions of the State Legislature of said State have been held at Guthrie, and the several Judges of the Supreme Court and the Court of Criminal Appeals have at all times kept their chambers and performed their official duties and functions at said City of Guthrie.

That prior to the admission of the State of Oklahoma into the Union, the Congress of the United States passed an act, entitled "An Act to Enable the people of Oklahoma and of the Indian Territory

to form a constitution and State Government and be admitted into the Union an on Equal Footing with the Original States; and to enable the People of New Mexico and Arizona to form a Constitution and State Government and be admitted into the Union on an Equal Footing with the Original States," which Act was approved on the 16th day of June, 1906. That by the terms of said Act, it is, among other things, provided:

"The capital of said State shall temporarily be at the City of Guthrie, and shall not be changed therefrom previous to Anno Domini Nineteen Hundred and Thirteen but said capital shall after said year be located by the electors of said State at an election to be provided for by the legislature: Provided, however, that the legislature of said State, except as shall be necessary for the convenient transaction of the public business of said State at said capital, shall not appropriate any public moneys of the State for the erection of buildings for capital purposes during said period."

That it is further provided in said Act of Congress:

"That the Constitutional Convention provided for herein shall, by ordinance irrevocable, accept the terms and conditions of this Act."

That pursuant to the requirements of said Enabling Act, the Constitutional Convention, which was provided for therein, did on the 22nd day of April, Anno Domini, 1907, after having been regularly elected, convened, sworn and organized, in regular session assembled, accept the terms and conditions of said Enabling Act by the adoption of an ordinance which is still in full force and effect and is as follows:

23 "Be it ordained by the Constitutional Convention for the proposed State of Oklahoma that said Constitutional Convention do, by this ordinance irrevocable, accept the terms and conditions of an Act of Congress of the United States, entitled "An Act to enable the People of Oklahoma and the Indian Territory to form a Constitution and State Government and be admitted into the Union on an Equal Footing with the Original States; and to Enable the People of New Mexico and Arizona to form a Constitution and State Government and be admitted into the Union on an Equal Footing with the Original States," approved June the Sixteenth, Anno Domini, Nineteen Hundred and Six."

which said ordinance was duly engrossed and an engrossed copy thereof transmitted to the President of the United States, together with an engrossed copy of the Constitution as ratified by the electors of said State, for his approval. That said State was admitted into the Union by Proclamation of the President, pursuant to said Act of Congress and the Constitution and resolutions adopted by the people of said State thereunder.

That relying upon the binding effect and good faith of the provisions of the Enabling Act aforesaid and of the resolution accepting the terms and conditions thereof, a large number of persons, including the plaintiff, have purchased real estate in said City of Guthrie and have erected homes and engaged in business and professional pursuits and invested large sums of money therein, which

said homes are now valuable and desirable, and the business investments profitable and the location of the seat of government of said State at said City of Guthrie has made said properties and said business pursuits and investments more valuable. That by reason of said seat of government being temporarily located at Guthrie a large number of persons connected with the State government are temporarily residents of said City, and the property owners in said City have erected a large number of modern dwelling houses, which they rent to such persons and the rentals from which constitute their principal income. That by reasons of said seat of government being located at Guthrie, a large number of transient persons having business with the various Departments of State visit said City constantly and especially during the sessions of the State Legislature
24 and of the Supreme Court and of the Criminal Court of Appeals of said State, and citizens of said County relying upon the binding force and effect of the terms of said Act of Congress and of the resolution accepting the same, have invested large sums of money in first class modern hotels and hotel equipment for the accommodation and entertainment of the numerous persons who visit said capital city by reason of the various departments of the State government being located thereat. That the removal of said seat of government from said City of Guthrie will depreciate the value of the residence and business property in said City of Guthrie, and will result in irremedia-l- loss and damage to the citizens of the City of Guthrie and of Logan County. That business and patronage of said hotels and of the professional and commercial interests of the inhabitants of said City of Guthrie will be materially affected, depreciated, injured, and damaged, and the citizens and inhabitants of said City of Guthrie will, if said seat of government be removed at this time, suffer great and irreparable loss and damage, and your petitioner will suffer loss and damage, in like manner.

That the defendants, in violation of the terms and conditions of the Enabling Act and of the ordinance irrevocable accepting the said Enabling Act, without authority of law, are wrongfully and in violation of the rights of the citizens of said City and of said County and State, threatening to and are about to attempt to remove the seat of government of said state to the City of Oklahoma City, and away from the City of Guthrie, and will, unless restrained and enjoined by this Court, each keep his office and the public records, books and papers, and transact the official business at the City of Oklahoma City, in said State, instead of at the City of Guthrie. That said threatened acts will, if permitted to be carried out, deprive the inhabitants and property owners of valuable rights and privileges conferred by the Constitution and laws of the United States, and deprive them of their property rights without due
25 process of law. That the expense of moving said offices and the public records, books, files, furniture, and other property belonging to said office will be from five to ten thousand dollars, which expense the State will be liable for, and which will add increased burdens to the tax payers and citizens of said State.

Wherefore, Your petitioner prays that a restraining order issue

without notice, restraining said defendants and each of them from removing any of the State property or records, files or papers of their several offices from the temporary seat of government at the City of Guthrie, or from attempting to set up at or to transfer the seat of government of said State to Oklahoma City, or any other place, other than the City of Guthrie, until a hearing can be had upon this petition. And plaintiff avers that an emergency exists, and that if notice is given of the application for said restraining order, the purposes thereof may be defeated. And petitioner further prays that said defendants and each of them be restrained from performing or attempting to perfo*mr* any official duty pertaining to their several State offices, at any other place than in the City of Guthrie, which by law is required to be performed or done at the seat of government of said State. And on final hearing that the restraining order may be made permanent and that said defendants and each of them be perpetually enjoined from moving or attempting to move any of the books, records, files, papers seals, furniture, or other property belonging or pertaining to their several offices, away from the City of Guthrie, or from doing or attempting to do or perform any official acts as State officers at any other place than the seat of government at Guthrie in the County of Logan and State of Oklahoma, until after the expiration of the year 1913, and until the capital of the State has been located by a vote of the electors of said State, at an election wherein is submitted such questions for their approval, and for the costs of this action and all proper relief in law or in equity, and for costs of this suit.

26 *Second Cause of Action.*

For a second and further cause of action, the plaintiff complains of the defendants, and for his cause of action alleges that he is a citizen and elector of the United States and of the State of Oklahoma, and that he is a resident and tax payer of the County of Logan, State of Oklahoma.

That the defendant Thomas P. Smith is the regularly appointed, qualified and acting Secretary of State of the state of Oklahoma; that the defendant E. D. Cameron is the duly elected and acting Superintendent of Public Instruction of the State of Oklahoma; that the defendant M. E. Trapp is the duly elected and acting State Auditor of the State of Oklahoma; that the defendant J. A. Menafee is the duly elected and acting State Treasurer of the State of Oklahoma; that the defendant C. A. Taylor is the duly — and acting Examiner and Inspector of the State of Oklahoma; that the defendant Charles Daugherty is the duly elected and acting Commissioner of Labor of the State of Oklahoma; that the defendant Kate Bernard is the duly elected and acting Commissioner of Charities and Corrections of the State of Oklahoma; that the defendants J. E. Love, A. P. Watson and J. J. McAlester are the duly elected, qualified and acting Corporation Commissioners of the State of Oklahoma; that J. J. Quarles, A. J. Allen and J. T. Dickerson are the duly appointed,

qualified and acting members of the State Board of Public Affairs; that the defendant Charles West is the duly elected, qualified and acting Attorney General of the State of Oklahoma; that the defendant Milas Lassater is the duly appointed, qualified and acting Commissioner of Insurance of the State of Oklahoma; that the defendants Seth Cordon, W. J. Leahy and Jake Hammon are the duly appointed, qualified and acting members of the State Election Board of the State of Oklahoma; that the defendant E. B. Cockrell is the State Bank Examiner of the State of Oklahoma, and that the defendant Frank M. Canton is the duly appointed, qualified and acting Adjutant General of the State of Oklahoma.

27 That the seat of government of the State of Oklahoma is now and has been since the admission of said State into the Union located at the City of Guthrie, in the County of Logan and State of Oklahoma.

That by the terms and provisions of the act of Congress approved on the 16th day of June, 1906, generally known as the Enabling Act, which Act made provision for the admission of the State of Oklahoma into the Union upon certain terms and conditions provided in said Act, it was among other provisions specifically provided that the capital of the State of Oklahoma should temporarily be at the City of Guthrie, and should not be changed therefrom previous to the year 1913, but that after said year the said capital should be located by the electors of said State at an election to be provided for by the State legislature, and further providing that no appropriation of any public moneys of the State of Oklahoma for the erection of buildings for capital purposes should be made during said period. And it is further provided in said Act of Congress that the Constitutional Convention authorized by said Act to be selected by the electors of the Oklahoma and Indian Territories for the purpose of proposing and submitting a constitution to enable said Territories to be admitted into the Union as a state should by ordinance irrevocable accept the terms and conditions of said Enabling Act, among which terms and conditions was the requirement that the temporary seat of government of said State, when formed, should be and remain at the City of Guthrie until after the year 1913.

That pursuant to the requirements of said Enabling Act, the Constitutional Convention which was provided for and authorized by the provisions of said Act, did on the 22nd day of April, 1907, in regular session assembled, accept the terms and conditions of said Enabling Act by the adoption of an ordinance irrevocable, which said ordinance is still in full force and effect and has never been repealed, modified or superseded. That said ordinance was duly and regularly engrossed, and an engrossed copy thereof duly trans-

28 mitted to the President of the United States, together with an engrossed copy of the Constitution of said State as submitted by the Constitutional Convention authorized by said Act of Congress and as ratified by the electors of said State for his approval. That the President of the United States examined and approved said constitution and ordinance, and pursuant to said Act of Congress, issued his proclamation admitting the State of Oklahoma into the Union.

That ever since the admission of said State the temporary seat of government has been and remains at the City of Guthrie, as provided in said Enabling Act, and all of the State offices have been maintained at said City of Guthrie, and the public business of the State duly and regularly transacted thereat.

That the several defendants and all other State officers have since the admission of said State into the Union kept their offices and public records, books, files, papers, and furniture belonging to the State at the said temporary seat of government, and have transacted all official duties at said place continuously until this date. That all the regular legislative sessions of the State Legislature, of said State have been held at Guthrie, and the several Justices of the Supreme Court and of the Court of Criminal Appeals have at all times kept their chambers, held their sessions and performed their official duties and functions at the said City of Guthrie.

That on the — day of November, 1910, the Governor of the State of Oklahoma, without any legal cause, justification or excuse, falsely and fraudulently, by a public proclamation reciting that in his opinion the public welfare required that an extraordinary session of the State legislature of the State of Oklahoma should be convened at the City of Oklahoma City, in Oklahoma County, in said State, on the 26th day of November, 1910. That said proclamation was duly issued and published by the Governor of said State, convening the legislature of said State in extraordinary session at Oklahoma City on the 28th day of November, 1910.

29 Plaintiff further avers that on the 8th day of November, 1910, there was held in and throughout the State of Oklahoma a regular biennial election for the election of State, County, Township, and other officers, at which election there was elected by the electors of said State a member of the House of Representatives for each representative district of said State, as well as one Senator from one-half the number of senatorial legislative districts in said State. That all of said members-elect had prior to the 28th day of November, 1910, received their certificates of election, but had not otherwise qualified for their said several offices.

That on the 28th day of November, 1910, there was residing in each senatorial legislative district in said State a duly elected, qualified and acting Senator who had been regularly elected at a regular election prior to that time, and whose term of office had not yet expired. That there was on the 28th day of November, 1910, residing in the several representative districts in said State a duly elected, qualified and acting Representative who had been theretofore elected at the regular biennial election in November, 1908, and whose term of office had not expired on said 28th day of November, 1910, and who was qualified, eligible and competent to fill said office and discharge the duties of a member of the House of Representatives of the State legislature.

That pursuant to the call contained in the proclamation of the Governor as hereinbefore averred, the several persons who had been declared elected as Representatives on the 28th day of November, 1910, assembled at the City of Oklahoma City, and without

authority and in violation of the constitutional requirements, pretended to organize at said place a House of Representatives of the legislative assembly of said State, and then and there pretended to and did vote to concur in the call of the Governor of said State convening the legislature at Oklahoma City, and plaintiff avers that the persons who organized said pretended House of Representatives and attempted to ratify the act of the Governor in convening the legislature of said State at said time and place were not at
30 that time authorized or qualified to act as members of said legislature, for the reason that the term of office of said persons by the laws of said State, does not and did not begin until the 1st day of January, 1911, and for the reason that the members of the House of Representatives duly elected, qualified and authorized to act who were elected at the regular biennial election in November, 1908, were the legally qualified members of said House of Representatives, and were ready, able and willing to discharge the duties of said office, and were at that time the only duly qualified persons to sit as members of the House of Representatives and to discharge any of the duties incumbent upon such members.

That the persons who were duly elected Senators from the several senatorial districts to succeed the Senators whose terms of office would expire on the 1st day of January, 1911, were by the hold-over Senators recognized as the persons entitled to sit and act as members of the Senate at and during the said extraordinary session so convened as aforesaid, and plaintiff avers that by reason thereof the said Senate was not a legally constituted body for the reason that there was a duly qualified, existing and acting Senator in each senatorial district in the State whose term of office had not expired, and who was competent and qualified to sit and discharge the duties of their several offices as State Senators of said legislative assembly at the time the same was convened on the 28th day of November, 1910, and that the persons who had been elected at the November election, 1910, to serve as Senators for the term beginning on the 1st day of January, 1911, had no constitutional or legal authority to act as members of the Senate or legislature during the year 1910, or to act as such at said extraordinary session of the legislature. That notwithstanding said illegal, unconstitutional and unauthorized organization, said pretended body, claiming to be the State Senate of the legislative assembly of the State of Oklahoma, did
31 on the 28th day of November, 1910, pretend to take a vote of said persons to concur in the unauthorized and unconstitutional proclamation of the Governor of said State convening an extraordinary session of the legislature of said State at Oklahoma City. That by a majority of the votes aforesaid of the persons pretending to be the members of the State Senate and the members of the House of Representatives for said extraordinary session, the said unauthorized and unconstitutional call of the Governor was pretendedly concurred in.

That said legislature so convened and constituted is and was not the legislature of the State of Oklahoma; that it was an unauthorized and unconstitutional body, and had no authority to ratify or concur

in the call of the Governor for said extraordinary session at said unauthorized place away from the seat of government, or to pass any valid or legal laws for said State, or to perform any constitutional or legal duties.

That notwithstanding said unconstitutional and illegal organization, the said pretended legislature did on the 16th day of December, 1910, pass a so-called capital location bill, which pretended bill was duly approved by the Governor of said State, on the 29th day of December, 1910, and which has been filed in the office of the Secretary of State of the State of Oklahoma, and is now lodged in the said office.

That the said law is a local and special law, providing for the location of the seat of government at a specific place, and that prior to the enactment of said pretended law no notice had been given or published of the intended introduction of such bill, as required by Section 32 of Article 5 of the Constitution of the State of Oklahoma, and no verified proof of such publication has ever been filed with the Secretary of State.

32 That said legislative act is in violation of that provision of the Constitution requiring that every legislative act shall embrace but one subject, which shall be clearly expressed in its title, as contained in Section 57, Article 5 of the Constitution of the State of Oklahoma.

That notwithstanding that said law is unconstitutional, illegal and unauthorized, and of no force and effect, the said defendants and each of them are about to comply with its requirements, and are threatening to and are about to remove their offices, the State furniture, records, files, documents, papers, and paraphernalia belonging to their several offices, to the City of Oklahoma City, and are intending to there set up the seat of government of the State of Oklahoma, and there discharge the duties of their several offices, and will do so unless restrained and enjoined by the process of this Court.

That no election has been held under the provisions of the Enabling Act and ordinance irrevocable for the location of the permanent capital of the State of Oklahoma, and that by reason of the acceptance by the Constitutional Convention of the State of Oklahoma of the provisions of said Act of Congress, the said provision locating the temporary seat of government at the City of Guthrie until after the year 1913 became a law of the highest order, with the same force and effect as a provision of the Constitution of said State, and cannot be repealed, modified or abrogated except by a vote of the electors of said State whereat said question is properly submitted to them for their approval or rejection; that the legislature of the State of Oklahoma has no power or authority to repeal said law, and any law by them enacted repugnant to the terms of said provisions is nugatory and void.

The plaintiff further alleges that said so-called capital location is illegal, void and impossible of execution for the reason that it locates the capital of the State upon a vacant tract of land owned by

33 and which the title to is in private persons, and in which the State has no interest, legal or equitable. That the said tract

of land designated as the capital site is vacant farm land with no buildings thereon. That said site is designated as the seat of government of the State, and by the terms of the Constitution of the State, the executive, judicial and legislative departments of said State and the officers of said departments are required to hold their offices and their sessions and transact the business of the State at the seat of government. That there is no law now in force, authorizing or providing for the expense of the removal of the State offices, records, property, furniture, and fixtures from the present seat of government at the City of Guthrie, and no person is authorized to make such removal. That there is no law now in force in said State authorizing any person or authority to procure or provide buildings, rooms, offices, depositories and quarters for the various departments of state, and for the officers charged with the duty of transacting the business of said State, and to attempt to carry into effect said capital location bill will and of necessity must result in great damage, loss, and destruction to the records, archives and property of said State, and will add an additional burden to the tax payers of the State, which plaintiff will have to help pay.

The plaintiff further alleges that said bill for the location of the seat of government passed at the so-called extraordinary session of the legislature in December, 1910, was not read on three different days in each house of said legislature, and that it was not read at length after it was finally amended in either house on its final passage. That said bill was amended and the amendments were and are incorporated into the bill as it now stands by the clerks and employees of said legislature; and said bill as adopted on its final passage was never read at length in either house on its final passage, or prior thereto. That the proceedings by which the said legislature pretended to adopt said law were and are unconstitutional, ir-
34 regular and unauthorized, and render said bill unconstitutional and void.

Plaintiff further avers that said bill is a revenue bill, in that it provides for raising revenues by gift, donation and otherwise to the State for the purpose of erecting a capital building for the State. That said gifts, donations and revenues become the funds of the State, and belong to the State's revenues, and can only be expended or disbursed upon authority of an appropriation of the legislature. That said bill was passed, if passed at all, upon the last day of the session of said legislature and upon the day that said legislature adjourned sine die.

Plaintiff further alleges that said capital location bill is unconstitutional and void for the reason that the site designated for a state capital building consists of land to which the State has no title, legal or equitable, and in which the public has no interest and does not claim. That said site is owned by an individual, a person, or portions of it by different persons, and that said bill grants an exclusive right to such individual to have the state capital located upon his land, which said right and exclusive privilege is one not granted to or open to any other person, association or corporation within the State. That said right or privilege is of great value to the owner of

said site, who owns the adjoining and abutting lands, to-wit: the sum of One Hundred Thousand Dollars, which is not shared by other land owners of the State. That said bill makes no provision for the acquirement by the State of the lands designated as a capital site, either by purchase, gift, or condemnation, and makes no provision for the construction or erection of a building upon said site for the use and occupancy of the State. That said law violates that provision of the Constitution of the State of Oklahoma which provides that "every act of the legislature shall embrace but one subject, which shall be clearly expressed in its title." That the general purpose and intent of said act as appears from its entire context is to designate the site for a capitol building and to provide for the
35 ultimate erection of a capitol building without cost to the State. That the removal of the seat of government prior to the consummation of said visionary scheme of a free capital constitutes a different subject not germain to or connected with the aforesaid scheme, and that portion of said act which changes the seat of government immediately is repugnant to the said constitutional prohibition, and is therefore void.

Plaintiff further avers that said law is repugnant to and in conflict with that provision of the State Constitution requiring that all laws of a general nature shall have a uniform operation throughout the State.

Plaintiff further alleges that by the provisions of the Enabling Act and ordinance accepting the same, it is provided that the legislature of Oklahoma, except as shall be necessary for the convenient transaction of the public business of said State at the capital, shall not appropriate any public moneys of the State for the erection of buildings for capital purpose until after the permanent capital shall be located, and which under the law in force cannot be so located prior to Anno Domini 1913. That under the act of the legislature pretending to locate the capital at Oklahoma City immediately large sums of money will necessarily be appropriated and expended by the State in removing the records, furniture, and other incidental matters pertaining to the State officers, and the State Library, consisting of a large number of books, and that the cost and expense to the State by such removal will amount to the sum of about ten or fifteen thousand dollars. That there is now expended by the State of Oklahoma as rentals for buildings and office rooms for the accom-odation of the Business of the State at the City of Guthrie, the capital thereof,. the sum of $14,000 per annum and no more. That to provide suitable quarters for the accommodation of the State officers, the State Supreme and Appellate Courts at Oklahoma City, and the records of the State offices and courts at said place,
36 would cost, as petitioner is advised and believes, and therefore alleges as a fact to be true, not less than $40,000 per annum, or a sum exceeding the present cost of $26,000 per annum. That all of said sums of money needed to remove the said records, furniture, the State Library, etc., and the sums necessary to pay the additional rentals must be obtained by the State by levy of a tax upon the property of plaintiff and other tax payers, and plaintiff alleges that no

levy of taxes for such purposes can lawfully be made to provide funds for transacting the business of the State except at the City of Guthrie, the lawful seat of government, until such time as the permanent capital can be lawfully located.

That under the terms and conditions of the bill pretending to locate the permanent capital at Oklahoma City no sufficient capital building to provide rooms, vaults and accommodations for the use of the executive and judicial departments of the State can be erected and completed for a period of from three to four years, while in the meantime the State will be required to expend at least $26,000 per annum for rentals as aforesaid; and your petitioner avers that the excess of rentals paid out by the State until a suitable building may under the provisions of the Act of the legislature be constructed, will, in the aggregate, amount to a sum of from $75,000 to $100,000. That all of said sums of money will be raised by taxation levied upon the property of plaintiff and other tax payers of Oklahoma, and will be occasioned by reason of the permanent location of the State capital at this time and prior to the time fixed in the Enabling Act, and in violation of the ordinance of the Convention which framed the Constitution for the State of Oklahoma; and your petitioner further avers that the expenditure of all of said sums of money and no part thereof is necessary for the convenient transaction of the public business of the State at the City of Guthrie, the capital of said State as fixed by the Constitutional Convention which located
37 the temporary state capital, and is only made necessary by reason of the unconstitutional and unlawful acts of the pretended legislature in locating by legislative enactment the permanent capital of the State at this time and prior to the time fixed for such location by the said Constitutional Convention.

That by the terms of the law locating the permanent seat of government at Oklahoma City it is provided, among other things, that a Capital Commission be created, consisting of three members, who shall hold their office for a period of two years, the salary of the members of said Commission being fixed at $2,500.00 per annum; and it is further provided in said law that said Commission shall have power to employ a competent engineer and architect, and such clerical help as may be necessary to enable said Commission to determine what will be a suitable capital building for Oklahoma. That by reason of the creation of said Commission, and the salaries paid to the officers thereof, and the expenses incident to the employment of a competent engineer and architect and the necessary clerical and other assistance aforesaid, there will be entailed upon the State of Oklahoma an expense of, as your petitioner is informed and believes and therefore alleges the fact to be true, not less than $50,000 per annum for a period of two or more years, which sums will be a direct obligation against the State of Oklahoma, which must be borne and paid by the petitioner and the other tax payers of Oklahoma. That all of said expenses so incurred and the burden so imposed is in violation of the Enabling Act admitting Oklahoma to statehood, and in violation of the express provision of the ordinance of the Constitutional Convention which provides that the State shall

not incur any expenditure for a permanent capital building prior to Anno Domini 1913.

And your petitioner avers that the legislative act pretending to permanently locate the capital at this time and provide for a building, by reason of its provisions as herein mentioned and the
38 burden imposed upon petitioner and other tax payers in all the respects herein mentioned and set forth, is unconstitutional and void.

And your petitioner further avers that the legislature which convened at Oklahoma City on the 28th day of November, 1910, could not under the laws and Constitution of the State of Oklahoma lawfully hold a session of the legislature at said City, and could not pass a law which convened at said place, because it is provided in Section 26, Article 5 of the Constitution of the State of Oklahoma, that:

"The members of the legislature shall meet at the seat of government on the first Tuesday after the first Monday in January, at 12 o'clock Noon, in the year next succeeding their election, or upon such other day as may be provided by law."

That to wit: November 28, 1910, when said legislature convened at Oklahoma City, the seat of government of the State of Oklahoma was located at Guthrie, in said State, and at said date was not located at Oklahoma City, in said State. That prior to the meeting of said legislative body at Oklahoma City, and in violation of the Constitution of the State of Oklahoma, the Governor of said State, by a proclamation, called and convoked said legislature to meet at Oklahoma City. That as authority for convening the legislature at said place the Governor in his said proclamation set forth that the public safety and welfare and the safety and health of the members of the legislature required a meeting of said legislative body at said Oklahoma City; and your petitioner avers that in truth and in fact the public safety or welfare did not require that legislative body to meet at a place other than the seat of government or at a place other than Guthrie. That no disorder of any kind or character existed at or in the vicinity of Guthrie, and no evil condition of any nature or kind existed which was inimical to the safety of the public or of any person in or about the City of Guthrie. That the public welfare was in a state of complete and profound peace. That the sanitary
39 conditions in and about the City of Guthrie on November 28, 1910, and for a long time prior thereto, and at all times since, were and have been in a wholly healthful and satisfactory condition. That no pestilential or other contagious diseases were in existence in Guthrie at, prior to, or since the said legislative body convened at Oklahoma City, and that nothing existed in or about the City of Guthrie which would impair or threaten the health of the members of the legislative body, and that there was no feeling of enmity or dislike among the citizens of Guthrie against any member of the legislative body. That all of said facts were well known and understood by the Governor at the date when he issued his proclamation convening said legislative body at Oklahoma City. That notwithstanding such knowledge, the Governor, with the intent and purpose of ignoring and evading the constitutional pro-

vision of the State, and in complete defiance of the provisions thereof, and with an arbitrary and revolutionary purpose upon his part, and in defiance of and disregard of the constitutional provisions aforesaid and for the avowed and express purpose of trying to injure the City of Guthrie, fraudulently and designedly issued the proclamation convening the legislative session at Oklahoma City. That all of the acts of the Governor in convening said legislative body at Oklahoma City are a scandal to the State, and were done and performed without the exercise of reason or discretion, and through a blind and unreasoning prejudice, and with the fraudulent and unlawful purpose and intent of ignoring the Constitution of the State and its wholesome restraints relating to the matter of the place where said legislative body should convene.

That said Governor, prior to issuing the proclamation aforesaid convening said legislative body at Oklahoma City, had, in violation of the law and Constitution of the State, kept his office and transacted all business performed by him on behalf of the public at Oklahoma City and away from the seat of government, and had directed the other State officers to leave the lawful seat of government and keep and hold their offices at Oklahoma City, and had refused to recognize the City of Guthrie, as the lawful seat of government, and constantly from and after June 11, 1910, up until the date when said legislature convened at Oklahoma City had undertaken by his official acts to nullify the provisions of law requiring all State officials to maintain their offices at the seat of government. That the convening of said legislative body at Oklahoma City was done with the willful and fraudulent purpose of having the constitutional provisions requiring said legislative body to meet at the seat of government and to further the unlawful scheme and plan which had been pursued since June 11, 1910, of ignoring the constitutional provisions relating to the seat of government, and was not done in good faith or in a belief or opinion that the public safety or welfare, or the safety or health of the members of the legislature required said legislative body to meet at Oklahoma City.

The plaintiff further alleges that an emergency exists for immediate action. That the defendants are intending to move to Oklahoma City, and are now in the act of transferring the seat of government from Guthrie, and will unless restrained by the order of this Court, before notice can be given and a hearing had, move their offices and the records, furniture and property of the State pertaining to their several offices from Guthrie to Oklahoma City, and the purposes of this suit will be defeated.

Wherefore, Plaintiff prays that a temporary injunction issue without notice, restraining the said defendants and each of them, their successors, agents, servants and employees, from moving or attempting to move from the City of Guthrie, where the same now are, any of the records, documents, files, furniture, property, archives, or paraphernalia pertaining to their several offices and belonging to the State, or from attempting to transact any official business of the

State incumbent on or appertaining to their several offices
41 until the further order of this Court, and that the Court fix a day certain and place when and where said hearing will be hand, and directing the defendants and each of them to appear at said time and place and show cause why said temporary injunction shall not be made permanent and perpetual, and that upon final hearing the said defendants and each of them, their successors, assistants, deputies, clerks, employees and agents be forever enjoined from performing any official acts pertaining to their several offices, and required to be performed at the seat of government, at any other place than the City of Guthrie, or until such time as the permanent seat of government of said State shall be located by a vote of the electors of said State, as authorized by the legislature of said State after the year 1913, and that in the meantime they be enjoined from moving or attempting to move the seat of government to Oklahoma City, and that he have judgment for his costs, and all proper relief either at law or in equity.

BURFORD & BURFORD,
C. G. HORNER,
DALE, BIERER & HEGLER,
Attorneys for Plaintiff.

42 STATE OF OKLAHOMA,
Logan County, ss:

W. H. Coyle, being duly sworn, upon his oath states that he is the plaintiff in the above entitled cause; that he knows the contents of the above and foregoing petition, and that the same are true.

W. H. COYLE.

Subscribed and sworn to before me this 30th day of December, 1910.

[SEAL.] MARIE E. TERRELL,
Notary Public.

My Commission expires November 18, 1912.

Endorsed: No. 2225. In the Supreme Court of the State of Oklahoma, W. H. Coyle, Plaintiff, vs. Thomas P. Smith, Secretary of State of the State of Oklahoma, et al., Defendants. Petition. (Filed December 31, 1910, W. H. L. Campbell, Clerk.) Burford & Burford, C. G. Hornor, and Dale, Bierer & Hegler, Attorneys for Plaintiff.

43 In the Supreme Court of the State of Oklahoma.

W. H. COYLE, Plaintiff,

v.

THOMAS P. SMITH, Secretary of State of the State of Oklahoma; E. D. Cameron, Superintendent of Public Instruction of the State of Oklahoma; M. E. Trapp, State Auditor of the State of Oklahoma; J. A. Menafee, State Treasurer of the State of Oklahoma; C. A. Taylor, Examiner and Inspector of the State of Oklahoma; Charles Daugherty, Commissioner of Labor of the State of Oklahoma; Kate Bernard, Commissioner of Charities and Corrections of the State of Oklahoma; J. E. Love, A. P. Watson and J. J. McAlester, Corporation Commissioners of the State of Oklahoma; J. J. Quarles, A. J. Allen and J. T. Dickerson, Composing the Board of Public Affairs of the State of Oklahoma; Charles West, Attorney General of the State of Oklahoma; Milas Lassater, Commissioner of Insurance of the State of Oklahoma; Seth Cordon, W. J. Leahy and Jake Hammond, Composing the State Election Board of the State of Oklahoma; E. B. Cockrell, Bank Commissioner of the State of Oklahoma, and Frank M. Canton, Adjutant General of the State of Oklahoma, Defendants.

Demurrer.

Now come the above named defendants, and each of them, and jointly and severally demur to the plaintiff's petition filed in the above entitled case and to each count or cause of action therein, on the ground and for the reasons following, to-wit:

First. Because said plaintiff's petition or neither count thereof, states facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendants, or either of them.

Second. Because said petition, or neither count thereof, shows any ground for equitable relief in favor of the plaintiff and against the defendants or either of them.

CHARLES WEST,
Attorney General;
W. C. REEVES,
Assistant Att'y General,
Attorneys for Defendants.

44 STUART, GORDON & LIEDTKE,
LEDBETTER, STUART & BELL, AND
BURWELL, CROCKETT & JOHNSON,
Of Counsel.

Endorsed: No. 2225. In the Supreme Court of the State of Oklahoma. W. H. Coyle, Plaintiff, v. Thomas P. Smith, et al., defendants. Demurrer. (Filed January 3, 1911. W. H. L. Campbell, Clerk.)

45 In the Supreme Court of the State of Oklahoma.

W. H. COYLE, Plaintiff,

v.

THOMAS P. SMITH, Secretary of State of the State of Oklahoma; E. D. Cameron, Superintendent of Public Instruction of the State of Oklahoma; M. E. Trapp, State Auditor of the State of Oklahoma; J. A. Menafee, State Treasurer of the State of Oklahoma; C. A. Taylor, Examiner and Inspector of the State of Oklahoma; Charles Daugherty, Commissioners of Labor of the State of Oklahoma; Kate Barnard, Commissioner of Charities and Corrections of the State of Oklahoma; J. E. Love, A. P. Watson, and J. J. McAlester, Corporation Commissioners of the State of Oklahoma; J. J. Quarles, A. J. Allen and J. T. Dickerson, Composing the State Board of Public Affairs of the State of Oklahoma; Charles West, Attorney General of the State of Oklahoma; Milas Lassater, Commissioner of Insurance of the State of Oklahoma; Seth Cordon, W. J. Leahy, and Jake Hammon, Composing the State Election Board of the State of Oklahoma; E. B. Cockrell, Bank Commissioner of the State of Oklahoma, and Frank M. Canton, Adjutant General of the State of Oklahoma, Defendants.

Notice of Application for Temporary Injunction.

The above named defendants and each of them are hereby notified that the plaintiff has filed his petition in the Supreme Court of Oklahoma praying for a permanent injunction restraining you and each of you, your successors, deputies, assistants and employees from removing or attempting to remove your offices or the records, files, books, seals, documents, furniture and property pertaining to your several offices, from the City of Guthrie, the seat of government of said State, to Oklahoma City, and restraining you from transacting or attempting to transact any official business required to be transacted at the seat of government at any other place than at the City of Guthrie; and also praying that pending the hearing and final disposition of said action, a temporary injunction
46 be granted and issued, restraining the commission of the aforesaid acts. And that counsel for plaintiff will apply to the Supreme Court, at its special session to be held in Oklahoma City, on Tuesday, January 3, 1911, at 10 o'clock a. m., or as soon thereafter as counsel can be heard, for an order granting said temporary injunction.

BURFORD & BURFORD,
C. G. HORNOR,
DALE, BIERER & HEGLER,
Attorneys for Plaintiff.

STATE OF OKLAHOMA,
County of Logan, ss:

Lon Muxlow, being duly sworn, upon his oath, says that he delivered an original of which the within notice is a true and complete

copy to each of the within named defendants, personally, at the times herein indicated below, to-wit:

C. A. Taylor,	on	Dec.	31,	1910,	at	1.30	o'clock	p. m.
Charles Daugherty,	"	"	"	"	"	"	"	"
J. A. Menafee,	"	"	"	"	"	2.00	"	"
J. E. Love,	"	"	"	"	"	2.10	"	"
J. J. McAlester,	"	"	"	"	"	"	"	"
J. J. Quarles,	"	"	"	"	"	2.15	"	"
Charles West,	"	"	"	"	"	2.30	"	"
E. D. Cameron,	"	"	"	"	"	4.00	"	"
Frank Canton,	"	"	"	"	"	5.00	"	"
T. P. Smith,	"	"	"	"	"	11.55	"	"
Kate Barnard,	"	Jan.	2,	1911,	"	12.00	"	noon.
R. J. Allen,	"	"	"	"	"	12.15	"	p. m.
A. P. Watson,	"	"	"	"	"	12.15	"	"
Seth Cordon,	"	"	"	"	"	1.20	"	"

47 This January 2nd, 1911.

LON MUXLOW.

Subscribed ans sworn to before me this second day of January, 1911.

[SEAL.] H. G. FARQUHARSON,
Notary Public.

My commission expires February 26, 1911.

Endorsed: No. 2225. Filed January 3, 1911, W. H. L. Campbell, Clerk.

48 And thereafter, to-wit on the 3rd day of January 1911, in the Supreme Court of Oklahoma, the following proceedings were had in said cause:

Supreme Court, November Term, 1910, January 3rd, 1911, Eleventh Judicial Day.

#2225.

W. H. COYLE, Plaintiff,
vs.
THOS. P. SMITH et al., Defendants.

And now on this day it is ordered by the court, that the above cause be, and the same is hereby set for hearing, Thursday, morning, at ten o'clock A. M. at Guthrie.

49 And thereafter, to-wit on the 5th day of January 1911, in the Supreme Court of Oklahoma, the following proceedings were had in said cause:

In the Supreme Court of the State of Oklahoma.

#2225.

W. H. COYLE, Plaintiff,
vs.
THOS. P. SMITH et al., Defendants.

And now on this Thursday, January 5th, 1911, at ten o'clock A. M. at the City of Guthrie, the above entitled cause comes on for hearing by the Court, and the cause is argued orally by both parties, and the cause is submitted.

50 And thereafter, to-wit, on the 9th day of February, 1911, the following proceedings were had in the Supreme Court of Oklahoma, in said cause:

#2225.

W. H. COYLE, Plaintiff,
vs.
THOS. P. SMITH et al., Defendants.

And now this cause comes on for final decision and determination by the court upon the record and briefs filed herein.

And the Court having duly considered the same and being fully advised in the premises, finds, that the demurrer to the petition should be sustained, and the petition dismissed.

It is therefore ordered and adjudged by the court that the demurrer to the petition in the above entitled cause, be, and the same is hereby sustained, and the petition dismissed.

Opinion by Wiliams, J. Hayes J, and Turner C. J. Concur, and Kane and Dunn, JJ. dissent, both of whom file dissenting opinion-.

51 In the Supreme Court of the State of Oklahoma.

W. H. COYLE, Plaintiff,
vs.
THOMAS P. SMITH, Secretary of State of the State of Oklahoma, et al., Defendants.

Journal Entry.

Now on this 9th day of February, 1911, the Court being regularly convened in regular session, the plaintiff, W. H. Coyle, appears by his attorneys Burford & Burford, Dale, Bierer & Hegler, and C. G. Hornor, and the defendants, Thomas P. Smith, et al., appear by their attorneys B. F. Burwell, W. A. Ledbetter and C. B. Stuart, and this cause coming on for decision upon the defendants' de-

murrer to the plaintiff's petition, the Court files its written opinion by Justice Williams, concurred in by Chief Justice Turner and Justice Hays, and renders its judgment sustaining said demurrer, Justices Kane and Dunn dissenting.

And now the plaintiff elects to stand upon his petition and declines to further plead. Wherefore, It is by the Court ordered, adjudged and decreed that the plaintiff take nothing by this petition and action, and that said petition be and the same is hereby dismissed at the costs of said petitioner.

It is further ordered and adjudged that the defendants do have and recover of and from the plaintiff their costs herein laid out, incurred and expended, taxed at the sum of — Dollars, for which let execution issue.

JOHN B. TURNER,
Chief Justice Supreme Court,
State of Oklahoma.

[Endorsed:] #2225. Filed Feb. 14, 1911. W. H. L. Campbell, Clerk.

52 In the Supreme Court of the State of Oklahoma.

(Filed 9th day of February, 1911.)

No. 2225.

W. H. COYLE, Plaintiff,
v.
THOS. P. SMITH et al., Defendants.

(*Syllabus.*)

The action of the Governor in convoking the Legislature at, or adjourning it to, another place than the seat of government "when in his opinion the public safety or welfare, or the safety or health of the members require it" such convoking or adjournment having been separately concurred in by *by* a two-thirds vote of all the members elected to each branch of the Legislature, is conclusive upon, and not subject to be reviewed by, this court.

2. The Legislative body, as convoked and constituted at an extraordinary session, assembling more than fifteen days after the date of the regular State election held throughout the State in November, 1910, the House of Representatives being composed of the members elected at said election, and the Senate by the members elected at said election: Held, that said body was legally constituted.

3. An act entitled "An Act Providing for the Permanent Location of the Seat of Government and Capital of the State of Oklahoma, Creating a Board of Capital Commissioners and Defining its Powers and Duties, Authorizing the Governor to Accept for Capital Purposes *and* Proceeds of the Sale of Land, or Donations from

other Sources, and Declaring and Emergency," is neither a special nor local law.

4. The title of said act is not repugnant to section 57 of article 5 of the Constitution.

5. When an enrolled bill has been signed by the speaker of the House and by the President of the Senate, respectively, in the presence of those bodies immediately after the bill has been read publicly at length and the same has been approved by the Governor and deposited in the office of the Secretary of State, it is not competent to show from the journals of the House that the act so authenticated, approved and deposited, was not read on three different days in each House.

6. Said act is not invalid on account of the provision of the enabling act requiring by irrevocable ordinance that the capital of the State shall temporarily be at the City of Guthrie, and not be changed therefrom previous to A. D. 1913, after which time it shall be located by the electors of said state at an election to be provided for by the Legislature.

53 7. It is within the power of the Legislature to locate the capital of this State.

Original Action in Injunction.

John H. Burford, C. G. Hornor, Frank Dale, A. G. C. Bierer, Frank B. Burford and Ben F. Hegler, for Plaintiff.

C. B. Stuart, B. F. Burwell, and W. A. Ledbetter, for Defendants.

Opinion of the Court, by Williams, J.

The following questions are essential for determination:

(1) Was the action of the Governor in convoking the Legislature at Oklahoma City valid?

(2) Was said Legislative Body as convoked at said extraordinary session legally constituted?

(3) Is a certain act passed at said session entitled "An Act Providing for the Permanent Location of the Seat of Government and Capital of the State of Oklahoma, Creating a Board of Capital Commissioners and Defining its Powers and Duties, Authorizing the Governor to Accept for Capital Purposes the Proceeds of the Sale of Land, or Donations from other Sources, and Declaring an Emergency" a special or local law?

(4) Is the title of said act repugnant to section 57 of article 5 of the Constitution?

(5) Is said act void for the reason that it was not read on three different days in each House?

(6) Is said act violative of the provisions of the enabling act requiring that the Capital of the State "shall temporarily be at the City of Guthrie and not be changed therefrom previous to A. D. 1913, after which time it shall be located by the electors of said State at an election to be provided for by the Legislature," with the limitation that the Legislature, except as shall be necessary for the

convenient transaction of the public business of said State at said *State at said* capital, shall not appropriate any public moneys of the State for the erection of buildings for Capital purposes during such period?

(7) Can the Legislature locate the Capital of the State?

54 1. Section 14 of article 6 of the Constitution of this State provides that the Governor "may convoke the Legislature at, or adjourn it to, another place, when, in his opinion, the public safety or welfare, or the safety or health of the members require it: Provided, however, that such change or adjournment shall be concurred in by a two-third- vote of all the members elected to each branch of the Legislature." The obvious meaning of this provision is that when the Governor convokes the Legislature in session at any place other than the Capital, after assembling, each House must separately concur in such convocation by a two-thirds vote of all the members elected to the respective bodies. It is admitted that by a two-thirds vote of all the members elected to each branch of the Legislature such call was separately concurred in, after the Legislature assembled in Oklahoma City. If it was necessary for the Legislature to first meet at Guthrie, the Seat of Government, and having concurred in such call, to adjou*rn* to the place at which it was originally convoked, said provision of section 14, *supra*, must be construed to mean that the Governor may convoke the Legislature at another place other than the Capital, when, in his opinion, the public safety or welfare, or the safety or health of the members may require it, provided, however, that such change shall be concurred in by a two-thirds vote of all the members elected to each branch of the Legislature, at a meeting held at the Capital before assembling at the place to which it was convoked. Such seems not to be the reasonable construction. It was evidently contemplated by the framers of the Constitution that before the Governor would convoke the Legislature at a place other than the Seat of Government, an emergency would exist involving the public safety or welfare, or the safety or health of the members requiring such temporary change in the place of assembling, and if such exigency required them to assemble at another place, it would not be reasonable to suppose it was intended, or be reasonably practicable, for the Legislature to first assemble at the Seat of Government and concur in such call of the Governor, before they could legally as-

55 semble at the place to which they were convoked. Such emergency as was contemplated would, in most instances, render that impossible. For instance, in time of war, insurrection, epidemics or pestilence, etc.

The reasonable construction is that after they were convoked at such other place, when they assembled, unless two-thirds of all the members elected to each branch of the Legislature separately concurred in such call, then such call would be a nullity. It appearing that such call was so concurred in after assembling at the place to which they were convoked, the action of the Governor and the Legislature in the premises is conclusive upon, and not subject to be reviewed by this court. Oklahoma City v. Shields, 22 Okla. 305;

State ex rel. v. Brown, Judge, 24 Okla. 433; Martin v. Mott, 12 Wheaton, 19; In re Special Session, 9 Colo. 642; People v. Hatch, 33 Ill. 9; Farrell v. Cole, 50 Kan. 356; Taylor v. Beckham, 108 Ky. 278; People v. Rice, 65 Hun. (20 N. Y. Sup.) 296; People v. Parker 3 Neb. 409, 19 Am. Rep. 634; Vanderheyden v. Young, 11 Johns, 150; In re Legislature Adjournment, 18 R. I. 824; State v. Fair, 35 Wash. 127.

2. Section 9, article 5 of the Constitution of this State provides:

"The Senate, except as hereinafter provided, shall consist of not more than forty-four members, whose terms of office shall be four years: Provided, That one Senator elected at the first election from each even numbered district shall hold office until the fifteenth day succeeding the regular State election in nineteen hundred and eight, and one elected from each odd numbered district at said first election, shall hold office until the fifteenth day succeeding the day of the regular State election in nineteen hundred and ten: And Provided Further, that in districts electing two senators the two elected at the first election shall cast lots in such manner as the Legislature may prescribe to determine which shall hold the long and which the short term."

And Section 10 of article 5 of the Constitution provides:

"The House of Representatives, unless otherwise provided by law, shall consists of not more than one hundred and nine members who shall hold office for two years. Provided, That the representatives elected at the first election shall hold office until the fifteenth day succeeding the day of the regular state election in nineteen hundred and eight: And provided, That the day on which state elections shall be held shall be fixed by the Legislature.

56 (a) The first Legislature shall meet at the seat of government upon proclamation of the Governor on the day named in said proclamation, which shall not be more than thirty days nor less than fifteen days after the admission of the State into the Union. * * *"

Section 40 of the Schedule of the Constitution is as follows:

"The terms of all officers of the State government elected at the time of the adoption of this Constitution shall begin upon the admission of the State into the Union."

Section 41 of the Schedule also provides:

"All persons elected at the time of the adoption of this Constitution to any of the offices provided under the Constitution shall be deemed to have duly qualified upon their taking the oath of office before any officer authorized by law to administer oaths, and executing such bond as may be required by law."

If no provision had been inserted in sections 9 and 10 supra, it would be clear that it was the intention of the framers of the Constitution that the terms of the members of the House would begin on the date of the admission of the State into the Union, and continue for two years.

The ordinance under which the Constitution was submitted to the electors of the proposed State for ratification or rejection and the election of the first set of State officers, including county and town-

ship officers, provided for said election to be held on the 17th day of September in 1907, and, on Friday following the day on which such election was to be held, to wit, Tuesday, for the returns in each county to be canvassed and certified copies or abstracts as to state and district officers, together with the vote as to the Constitution, to be immediately returned to the Secretary of the Territory of Oklahoma, and on the 8th day of October, 1907, or as soon thereafter as practicable, the same to be opened, canvassed and the result certified and transmitted to the President of the United States, as provided in the enabling act.

The framers of the Constitution evidently recognized that the terms of the members of the Lower House and of the short term Senators of the first Legislature would be less than two years. In providing for such terms to expire on the fifteenth day succeeding the day of the regular state election in 1908, it was fixing a date certain, not only on which the terms of that Legislature
57 should expire in said year, but also on which the terms of their successors should begin. This is a reasonable construction producing harmony. Any other construction would bring about an unreasonable condition, or an interre-num between the fifteenth day succeeding the day of the regular state election in 1908, and the first day of January, 1909. Interregnums are not favored in law. Section 10 of article 23 of the Constitution as adopted, provides:

"Except wherein otherwise provided in this Constitution, in no case shall the salary or emoluments of any public official be changed after his election or appointment, or during his term of office, unless by operation of law enacted prior to such election or appointment; nor shall the term of any public official be extended beyond the period for which he was elected or appointed: Provided, that all officers within this State shall continue to perform the duties of their office until their successors shall be duly qualified."

This section is cited by the plaintiff in support of his contention that the Legislature was not properly constituted. If plaintiff's contention be true, the framers of the Constitution deliberately fixed the date of the termination of the terms of the members of the Lower House and of the short term Senators of the first Legislature at a certain date, and then, recognizing that section 3355 of Wilson's Rev. & Ann. St., 1903, Sec. 3110 Stats. Okla. Territory, 1893, would be extended in force in the state by virtue of section 2 of the schedule to the Constitution, in effect operating to extend such terms from the 15th day succeeding the day of the regular state election in November, 1908, to the first day of January, 1909, by providing that all officers within this state shall continue to perform the duties of their offices until their successors shall be duly qualified. If that was contemplated why not provide that such members of the House and short term Senators should hold to January 1, 1909, and not put the framers in the attitude of reaching such a result by such hotch potch means. This contention is contrary to the spirit of section 10, art. 23, supra.

According to plaintiff's contention said section 3355 supra, and act

of the Legislature of Oklahoma Territory as it was extended in force by section 2 of the schedule after the erection of the state,
58 had the effect of extending the terms, not only of all the members of the Lower House, but of the short term Senators of the first Legislature, which was contrary to the spirit of said section.

The proviso that all officers within this state shall continue to perform the duties of their office until their successors shall be duly qualified, does not enlarge on what goes before in said section, but is intended to cover exigencies arising from a failure in an election or appointment, or after an election or appointment being had or made, the officer fails to qualify, in which event the encumbent of such office should hold until such qualification was made, showing the abhorrence of the framers of the Constitution of bringing about an interregnum. The terms of the members of the Lower House and of the short term Senators of the first Legislature having expired on the 15th day after the regular state election in November, 1908, their successors having been duly elected in such state election, when they took the oath of office prescribed by section 1 of art. 15 of the Constitution, were duly qualified and succeeded to such office, and it was not within the power of the Legislature of the state to extend the original terms of the members of the Lower House and the short term Senators of the first Legislature, thereby depriving the representatives coming immediately from the powers of sovereignty to sit within the Legislative Halls as representatives of the people.

Further, when we consider the fact that the term of the Governor would expire on the second Monday of January, 1911, and every four years thereafter, there would probably be sufficient intervening time between the date on which the regular state election would be held and the expiration of the Governor's term in which a special or extraordinary session of the Legislature could be convened. If there should be a revolt of the people in sentimen*r* against the administration of the executive department resulting in the election of a new Legislature and a new Governor, who would inaugurate a policy different to that of the preceding administration, if the terms
59 of the me*n*-ers of the Lower House and one-hal*d* of the Senate expired at the same time as the term of the Governor, it might result in the Chief Executive calling an extraordinary session of the Legislature and the members thereof to enact laws, when members had been more recently elected by the people with a contrary mandate. It is to be apprehended that such was in view when these provisions were incorporated in the Constitution.

Sections 9 and 10 of article 5, and 40 and 41 of the schedule to the Constitution, pertain to the same general subject matter and accomplish the same general purpose as sections 3355 Wilson's Rev. & Ann. St. supra, (3310) St. Okla. Ter. 1893.)

In Smock v. Farmers' Union State Bank, 22 Okla. 825, 98 Pac. 945, this court said "House Bill No. 615 covers the entire grounds of said chapter 8 Wilson's Rev. & Ann. St. 1903, and of the four subsequent acts of the Legislature above referred to. It pertains to the same general subject-matter, and seeks to accomplish the same

general purpose and in the main is a re-enactment of those statutes in the same language, and we are therefore of the opinion that said act was intended by the Legislature as a substitute for all the laws then existing upon the subject-matter dealt with in that act, and that said former laws were repealed by it." This rule was approved and followed in Ripley & Son v. The Art Wall Paper Mills, recently decided by this court, but not yet officially reported.

Under this rule of construction said section 3355 would be repealed by substitution, and thereby being repugnant to the provisions of the Constitution was not brought over by section 2 of the schedule. Both bodies of the Legislature construed these provisions of the Constitution in the organization of their separate bodies, determining their respective memberships. This determination, relating solely to political questions was, by a branch of government, co-ordinate to this Court. This determination and conclusion reached by the legislative department was also concurred in by the executive department.

60 It is a recognized rule of construction that if the meaning of a constitutional provision is doubtful, a practical construction thereof by the Legislature will be followed by the courts, if it can be done without doing violence to the fair meaning of the words used in order to sustain the constitutionality of the statute. (8 Cyc. 737, and authorities cited in foot-note 82).

"Where the questions involved are of a political character, and action depends upon the construction to be given a constitutional provision, or statute, courts will not only give great consideration to constructions of such provisions or statutes by the political departments of the government in doubtful cases. * * *"

8 Cyc. 727; Luther v. Borden 7 How. (U. S.) 1, 12 Law Ed. 581; Griffin's Case, Chase (U. S.) 364, 17 Fed. Cas. No. 5,815, 2 Am. L. T. Rep. (U. S. Cts.) 93, 8 Am. L. Reg. (N. S.) 358; 3 Am. L. Rev. 784, 2 Balt. L. Trans. 433, 25 Tex. Suppl. 623; U. S. v. Lytle, 5 McLean (U. S.) 9, 25 Fed. Cas. No. 15,652.

In Betts v. Commissioners of the Land Office, 27 Okla. —; 110 Pac. 769, this court said:

"The Commissioners of the Land Office, a branch of the executive department of the state, having construed such rules and regulations as to include the authority to pay the necessary expenses and cost of such leasing out of the rentals, and the Legislature, after having knowledge of such construction, having failed to make an appropriation therefor, pursuant to section 55 of article 5 of the Constitution, evidently placed a like construction thereon, and the co-ordinate branches of government, to-wit, the executive and legislative departments, having so construed said provisions, such concurring construction, though not controlling, is pursuasive. (Higgins v. Brown) 20 Okla. 355, 94 Pac. 703; Territory v. Long Bell Lbr. Co. 22 Okla. 890, 99 Pac. 911; City Council, etc., v. Board of Commissioners, etc., 33 Colo. 1, 77 Pac. 858). * * *"

We do not feel that we would be justifiable in declaring the Legislature as organized in Oklahoma City to be an illegal body.

3. Section 32 of Article 5 of the Constitution provides, "That no

special or local law shall be considered by the Legislature until notice of the intended introductions of such bill or bills shall first have been published for four consecutive weeks in some weekly newspaper published or of general circulation in the city of county affected by such law, stating in substance the contents thereof, and verified
61 proof of such publication filed with the Secretary of State."

In Cordova v. State, 6 Texas Court of Appeals, 218, it is said:

"An ordinance passed by the Convention of 1875, which framed our present State Constitution, fixes the terms of the holding the District Court in the County of Bexar to the fourth Mondays in April and October, until otherwise provided by law. Art. 5 Sec. 7 of the Constitution reads as follows: 'The State shall be divided into twenty-six judicial districts, which may be increased or diminished by the Legislature. For each district, there shall be elected by the qualified voters thereof, at a general election for members of the Legislature, a judge, who shall be at least twenty-five years of age, shall be a citizen of the United States, shall have been a practicing attorney or a judge of a court of this State for a period of four years, and shall have resided in the district in which he is elected for two years next before his election; * * * and shall hold the regular term of court at one place in each county twice in each year, in such manner as may be prescribed by law. The Legislature shall have power, by general act, to authorize the holding of special terms, when necessary, and to provide for holding more than two terms of the court in any county, for the dispatch of business.'

Art. 3, sect. 57 of the Constitution is as follows: 'No local or special law shall be passed, unless notice of the intention to apply therefor shall have been published in the locality where the matter or thing to be affected may be situated, which notice shall state the contemplated law, and shall be published at least thirty days prior to the introduction into the Legislature of such bill, and in the manner to be provided by law. The evidence of such notice having been published shall be exhibited in the Legislature before such act shall be passed.'

The defendant claims that the act of the Legislature which gives five terms of the District Court to Bexar County is in contravention of the provisions of the Constitution, and is therefore null and void. All acts of the Legislature must be sustained by the courts, unless they are clearly and undoubtedly repugnant to the Constitution. The judiciary looks to the acts of the Legislature with just respect, and reconciles them with the Constitution, and sustains, them, if possible. In expounding a constitutional provision, such construction should be employed as will prevent any clause, sentence, or word from being superfluous, void or insignificant. The thing to be sought is the thought expressed. Contemporaneous legislative construction is always considered in force. The Constitution, in express terms, having conferred upon the Legislature the power, by general law, to provide for more than two terms of the District Court in any county, the Legislature, in passing the act under consideration, has, we believe, kept within its constitutional limits.

That act which provides for five terms of the District Court of Bexar County is not a 'local' or 'special' law, in the sense in which these terms are used in the Constitution. Said act is on a general subject,—the regulation of the courts,—which cannot be said to affect the welfare and interest of that district alone."

In State v. Corson, 67 N. J. L. Rep. 178, it is said:

"As to the contention that this act is a local or special law regulating the internal affairs of counties and granting exclusive
62 privileges to individuals: The act is said to regulate the internal affairs of counties because it applies only to the tide waters of Delaware Bay and Maurice river cove, which lie entirely within the counties of Cape May and Cumberland. But, although the area of application is limited to those counties, it clearly does not regulate their internal affairs, for it deals exclusively with property rights of the state, in which every citizen has an interest. That it confers exclusive privileges, however, is apparent. As was said in State v. Post, 26 Vroom, 264, the right to plant and cultivate oysters on the lands of the state is a privilege, and inasmuch as the statute excludes from the enjoyment of that right everyone except the lessees of the state and their licenses, the privilege is an exclusive one. But this fact does not deprive the state of power to appropriate all or any part of its lands under water for the encouragement and protection of the planting and cultivation of oysters, and to grant rights therein for that purpose. Its effect is to require such appropriation to be made by general laws, and it prevents the selection of individuals or corporations as to the objects of the state's bounty to the exclusion of other citizens of the state. State v. Post, supra. Is the law, then, a special or local law, and does it exclude any of the citizens of the state from participating in the privileges which it confers?

A statute is not special or local merely because it authorizes or prohibits the doing of a thing in a certain locality. It is, notwithstanding this fact, a general law, if it applies to all the citizens of the state and deals with a matter of general concern. Doughty v. Conover, 13 Vroom, 193. The application of this principle led this court in the case cited, to the conclusion that a statutory provision which made it unlawful for any person to net fish during certain periods of the year 'in the waters of Burlington and Atlantic' was not special or local, but general. Although it deals with the lands of the state under tide water only in certain localities, the matters which it regulates are of general, not local, concern. The lands themselves belong to the people of the state, not to the citizens of the counties where they are located."

See also Holt v. Mayor and Aldermen of Birmingham, 111 Ala. 369;

City of Pond Creek v. Haskell, — Okla. —, 97 Pac. 338;

Anderson v. Ritterbusch, — Okla. —, 98 Pac. 1002.

If said act be a special act, then every act of the Legislature fixing the salary of the Governor of the State, or the terms of the Supreme Court, or locating or making an appropriation for any particular

state institutions, would be a special act. And in order to change the salary of the Governor, or fix the terms of the Supreme Court, or locate or make an appropriation for such state institution, it would be necessary to first publish a notice as required by section 32 of article 5, supra. This provision of the Constitution
63 should receive a reasonable construction. This notice was required to be published where laws applying solely to particular individuals, or to any particular locality, were sought to be passed for the benefit or prejudice of such locality, in order that they might have an opportunity to appear before the Legislature and remonstrate against the passing of such law if they did not think it was wise. But when such law applies to every part of the state, locating the Capital for the entire state, the very fact that it locates it at a particular spot does not make it a special law.

4. Plaintiff urges that the title of the act in question to-wit: "An Act Providing for the Permanent Location of the Seat of Government and Capital of the State of Oklahoma, Creating a Board of Capital Commissioners and Defining its Powers and Duties, Authorizing the Governor to Accept for Capital Purposes the Proceeds of the Sale of Land, or Donations from Other Sources, and Declaring an Emergency," violates section 57 of article 5 of the Constitution, which provides:

"Every act of the Legislature shall embrace but one subject, which shall be expressed in its title, except general appropriation bills, general revenue bills, and the bills adopting a code, digest, or revision of statutes; and no law shall be revived amended, or the provisions thereof extended or conferred, by reference to its title, but only so much thereof as is revived, amended, extended, or conferred, shall be re-enacted and published at length. Provided, That if any subject be embraced in any act contrary to the provisions of this section, such act shall be void only as to so much of the law as may not be expressed in the title thereof."

In State v. Street, et al., 117 Ala. 203, in an opinion by the later Chief Justice Brickell, it was said:

"* * *, we could not hesitate to affirm that the act is free from all just objection as wanting in clearness in the expression of its subject in the title, or of duplicity in the expression of two dissimilar subjects, not having logical and legal connection. It is difficult to conceive of any two matters so treated by common law, and by legislation, and in popular understanding, as constituting but one general subject, as public roads and bridges."

This case was cited with approval by this court in Rea, County Clerk, v. Board of County Commissioners, Lincoln County, et al., decided at its September, A. D., 1910, term, but not yet officially reported.

64 The title of this act relates to the permanent location of the seat of government, or Capital of the State; the other parts thereof providing for a Board of Capital Commissioners, to the end that a capital, or a building for the state officers may be erected thereon, are cognate to the main subject. Certainly if bridges are cognate to the subject of roads, as the bridge when at-

tached to the soil becomes a fixture and a part of the realty, so will the capitol, or building for the housing of the state officers, when placed upon the grounds where the capital is located, become a part of the same as a fixture. See also State ex rel., v. Hooker, Judge, 22 Okla. 712.

5. It is insisted that the bill was not read upon its passage *and* three different days in each House, as required by section 34 of article 5 of the Constitution, and for that reason this court should declare the same invalid, although the presiding officer of each House has signed said bill and the same has been duly approved by the Governor and filed with the Secretary of State. This question has been settled against the contention of plaintiff in Atchison, Topeka & Santa Fe Ry. Co. v. State, decided at the January A. D., 1911 term of this court, but not yet officially reported. Paragraph one of the syllabus is as follows:

"When an enrolled bill has been signed by the speaker of the House and by the President of the Senate, respectively, in the presence of those bodies immediately after the bill has been read publicly at length and the same has been approved by the Governor and deposited in the office of the Secretary of State it is not competent to show from the journals of the House that the act so authenticated, approved and deposited did not pass in the form in which it was signed by the presiding officers and approved by the Governor."

There is no contention that the bill was not signed by the Speaker of the House and the presiding officers of the Senate respectively, in the presence of said bodies immediately after the same had been read publicly at length, or that the same had not been approved by the Governor and deposited in the office of the Secretary of State. This being so, it is not competent to show from the Journals of the House that the act so authenticated had not been read on three different days in each House.

65 6. The enabling act of Alabama (March 2, 1819), section 6, paragraph 4, in part provides:

"That the said convention shall provide by an ordinance irrevocable without the consent of the United States, that the people inhabiting the said Territory, do agree and declare * * *; and that all navigable waters within the said state shall forever remain the public highways, free to the citizens of said State and of the United States, without any tax, duty, impost, or toll therefor, imposed by the said State."

In Pollard et al. v. Hagan, et al., 3 How. 212, 11 L. Ed. 565, (decided in 1845), Mr. Justice McKinley, in delivering the opinion of the court, said:

"The contract made between the United States and the State of Georgia, was sanctioned by the Constitution of the United States; by the 3rd section of the 4th article of which it is declared that 'New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State, nor any State be formed by the junction of two or more States or parts of States, without the consent of the Legislature of the States concerned, as well as of Congress.'

When Alabama was admitted into the Union, on an equal footing with the original States, she succeeded to all the rights of sovereignty, jurisdiction and eminent domain which Georgia possessed at the date of the cession, except so far as this right was diminished by the public lands remaining in the possession and under the control of the United States, for the temporary purposes provided for in the deed of cession, and the legislative acts connected with it. Nothing remained to the United States, according to the terms in the agreement, but the public lands. And, if an express stipulation had been inserted in the agreement, granting the municipal right of sovereignty and eminent domain to the United States, such stipulation would have been void and inoperative, because the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty and eminent domain, within the limits of a State or elsewhere, except in the cases *in the cases* in which it is expressly granted. * * *

Alabama is therefore entitled to the sovereignty and jurisdiction over all the territory within her limits, subject to the common law, to the same extent that Georgia, possessed it before she ceded to the United States. To maintain any other doctrine, is to deny that Alabama has been admitted into the Union on an equal footing with the original States, the constitution, laws and compact to the contrary notwithstanding. But her rights of sovereignty and jurisdiction are not governed by the common law of England as it prevailed in the colonies before the Revolution, but as modified by our constitutions. In the case of Martin, et al., v. Waddell (16 Peters, 410), the present Chief Justice, in delivering the opinion of the court, said: 'When the Revolution took place the people of each State became themselves sovereign; and in that charter hold the absolute right to all navigable waters, and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution.' Then to Alabama belong the navigable waters, and soils under them, in controversy in this case, subject to the rights surrendered by the Constitution to the United States; and no contract that might be made between her and the United States could diminish or enlarge these rights."

66 Permoli v. Municipality of New Orleans, 3 How. 590, (Decided in 1845), follows and approves the principles announced in the foregoing case.

Section 5 of the enabling act for Ohio (Act April 30, 1802), provided that the proposed constitution should be republican and not repugnant to the ordinance of the 13th of July, 1787, between the original States and the people and the States of the territory northwest of the Ohio River.

In Strader et al., v. Graham, 10 How. 82 (decided in 1850), Mr. Chief Justice Taney, in delivering the opinion of the court, said:

"But it seems to be supposed in the argument, that the law of Ohio upon this subject has some peculiar force by virtue of the Ordinance of 1787, for the government of the Northwestern Territory, Ohio being one of the States carved out of it.

One of the articles of this Ordinance provides that 'there shall

be neither slavery nor involuntary servitude in the said Territory, otherwise than in punishment for crimes whereof the party shall have been duly convicted: Provided always, that any person escaping into the same, from whom labor or service is lawfully claimed in any of the original States, such fugitives may be lawfully reclaimed and conveyed to the person claiming his or her labor or service as aforesaid.' And this article is one of the six which the Ordinance declares shall be a compact between the original States in the said Territory, and forever remain unalterable unless by common consent.

The article assumes that the six articles which that Ordinance declares to be perpetual are still in force in the State since formed within the Territory, and admitted into the Union.

If this proposition could be maintained, it would not alter the question. For the regulations of Congress, under the old Confederation or the present Constitution, for the government of a particular territory, could have no force beyond its limits. It certainly could not restrict the power of the States within their respective territories; nor in any manner interfere with their laws and institutions; nor give this court any control over them. The Ordinance in question, if still in force, could have no more operation than the laws of Ohio in the State of Kentucky, and could not influence the decision upon the rights of the master or the slaves of that State, nor give this court jurisdiction upon the subject.

But it has been settled by judicial decision in this court, that this Ordinance is not in force.

The case of Permoli v. The First Municipality, 3 How. 589, depended upon the same principles with the case before us. It is true that the question in that case arose in Louisiana. But the act of Congress of April 7, 1798, chap. 28, (1 Stat. at Large, 549), extended the Ordinance of 1787 to the then Territory of Mississippi, with the exception of the anti-slavery clause; and declared that the peo-
67 ple of that Territory should be entitled to and enjoy all the rights, privileges, and advantages granted to the people of the Territory Northwest of the Ohio. And by the act of March 2, 1805, chap. 23 (2 Stat. at Large, 322), it was enacted that the inhabitants of the then Territory of Orleans should be entitled to and enjoy all the rights, privileges, and advantages secured by the Ordinance of 1787, and at that time enjoyed by the people of the Mississippi Territory.

In the case above mentioned, Permoli claimed the protection of the clause in one of the six articles which provides for the freedom of religion, alleging that it had been violated by the First Municipality. And he brought the question before this court, upon the ground that it had jurisdiction under the Ordinance. But the court held that the Ordinance ceased to be in force when Louisiana became a State, and dismissed the case for want of jurisdiction. This opinion is, indeed, confined to the Territory in which the case arose. But it is evident that the Ordinance cannot be in force in the States formed in the Northwestern Territory, and at the same time not in force in the States formed in the Southwestern Territory, to which it was extended by the present government. For the Ordinances

and pledges of the Congress of the Old Confederation cannot be more enduring and obligatory than those of the new government; nor can there be any reason for giving a different interpretation to the same words used in similar instruments, because the one is by the Old Confederation and the other by the present government. And when it is decided that this Ordinance is not in force in Louisiana, it follows that it cannot be in force in Ohio.

But the whole question upon the Ordinance of 1787, and the acts of Congress extending it to other territory afterwards acquired, was carefully considered in Pollard v. Hagan, 3 How. 212. The subject is fully examined in the opinion pronounced in that case, with which we concur; and it is sufficient now to refer to the reasoning and principles by which that judgment is maintained, without entering again upon a full examination of the question.

Indeed, it is impossible to look at the six articles which are supposed, in the argument, to be still in force, without seeing at once that many of the provisions contained in them are inconsistent with the present Constitution. And if they could be regarded as yet in operation in the States formed within the limits of the Northwestern Territory, it would place them in an inferior condition as compared with the other States, and subject their domestic institutions and municipal regulations to the constant supervision and control of this court. The Constitution was, in the language of the Ordinance 'adopted by common consent' and the people of the territories must necessarily be regarded as parties to it, and bound by it, and entitled to its benefits, as well as the people of the then existing States. It became the supreme law throughout the United States. And so far as any obligations of good faith had been previously incurred by the Ordinance, they were faithfully carried into execution by the power and authority of the new government.

In fact, when the Constitution was adopted, the settlement of that vast territory was hardly begun; and the people who filled it, and formed the great and populous States that now cover it, became inhabitants of the territory after the Constitution was adopted, and migrated upon the faith that its protection and benefits would be extended to them, and that they would in due time, according to its provisions and spirit, be admitted into the Union upon an equal footing with the old States. For the new government secured to them all the public rights of navigation and commerce
68 which the Ordinance did or could provide for; and moreover extended to them when they should become States much greater power over their municipal regulations and domestic concern than the Confederation had agreed to concede. The six articles, said to be perpetual as a compact, are not made a part of the new Constitution, and cannot confer power and jurisdiction upon this court. The whole judicial authority of the courts of the United States is derived from the Constitution itself, and the laws made under it.

It is undoubtedly true, that most of the material provisions and principles of these six articles, not inconsistent with the Constitution of the United States, have been the established law within this

territory ever since the Ordinance was passed; and hence the Ordinance itself is sometimes spoken of as still in force. But these provisions owed their legal validity and force, after the Constitution was adopted and while the territorial government continued, to the act of Congress of August 7, 1789, which adopted and continued the Ordinance of 1787, and carried its provisions into execution, with some modifications, which were necessary to adopt its form of government to the new Constitution. And in the States since formed in the territory, those provisions, so far as they have been preserved, owe their validity and authority to the Constitution of the United States, and the constitutions and laws of the respective States, and not the authority of the Ordinance of the old Confederates. As we have already said, it ceased to be in force upon the adoption of the Constitution, and cannot now be the source of the jurisdiction of any description in this court."

The enabling act for Mississippi (Mar. 1, 1817), provided that the Constitution when formed should not be repugnant to the principles of the ordinance of the 13th of July, 1787, between the people and States of the territory northwest of the Ohio river, so far as the same had been extended to the said territory by the articles of agreement between the United States and the State of Georgia, or of the Constitution of the United States, and also that the said convention should provide by an ordinance irrevocable that the people inhabiting said territory do agree and declare that the river Mississippi, and the navigable waters and rivers leading into the same, or into the Gulf of Mexico, shall be common highways, and forever free, as well to the inhabitants of the said State as to other citizens of the United States, without any tax, duty, impost, or toll therefor, imposed by the said State.

The act admitting said State into the Union (Dec. 10, 1817), declared that the people of the said territory did, on the 15th day of August in that year, by convention, frame for themselves a Constitution and state government in conformity to the principles of the articles of compact between the original States and the people and States in the Territory northwest of the river Ohio, etc.,
69 and that the State of Mississippi is declared to be one of the United States of America, and admitted into the Union on an equal footing with the original states, in all respects whatever.

In Withers v. Buckley, 20 How. 84, 15 L. Ed. 820, decided by a unanimous opinion, it is said:

"In considering this Act of Congress of March 1, 1817, it is unnecessary to institute any examination or criticism as to its legitimate meaning or operation, or binding authority farther than to affirm that it could have no effect to restrict the New State in any of its necessary attributes as an independent sovereign Government, not to inhibit or diminish its perfect equality with the other members of the Confederacy with which it was to be associated. These conclusions follow from the very nature and objects of the Confederacy from the language of the Constitution adopted by the States, and from the rule of interpretation pronounced by this court in the case of Pollard's Lesse- v. Hagan, 3 How., p. 223."

The enabling act of Illinois (April 18, 1818), provided that the Constitution should not be repugnant to the ordinance of the 13th of July, 1787, between the original states and the people and the states of the territory northwest of the Ohio river, except so much of said articles as related to the boundaries of the states therein to be formed. The resolution of Congress admitting the state (December 3, 1818), declared that the Constitution and state government so formed, being in conformity to the principles of the articles of the compact between the original states and the people and states in the territory northwest of the Ohio river, passed by the people in said territory on the 13th of July, 1787, the State of Illinois is declared to be admitted into the Union on an equal footing with the original states in all respects whatever.

Speaking of the ordinance of 1787, in Escanaba, &c. Co. v. City of Chicago, 11 Otto (107 U. S.) 678-691, the court said:

"* * * although the Act of April 18, 1818 (enabling the people of Illinois Territory, to form a Constitution and State Government, and the Act of Aug. 26, following, admitting the State into the Union), refer to the principles of the Ordinance according to which the Constitution was to be formed, its provisions could not control the authority and powers of the State after her admission. Whatever the limitation upon her powers as a government, whilst in a Territorial condition whether from the Ordinance of 1787, or the legislation of Congress, it ceased to have any operative force except as voluntarily adopted by her after she became a State of the Union. On her admission she at once became entitled to and possessed all the rights of dominion and sovereignty which belonged to the original States. She was admitted and could be admitted only on the same footing with them."

70 In Huse v. Glover, 11 Biss. 550, 15 Fed. 292, Mr. Justice Harlan, sitting on the circuit, said:

"Nor do we perceive that the power of the state in this respect is in any degree affected by the ordinance of 1787, even if that ordinance as to the matters now under consideration be not superseded by the Constitution of the United States. Illinois entered the Union upon terms of equality in all respects with the states which existed at the time the Constitution was formed. In the statute of Virginia, authorizing the cession to the United States of the territory northwest of the Ohio river, and in the deed of cession, one of the conditions prescribed was that the states formed out of that territory should be admitted 'members of the Federal Union, having the same rights of sovereignty, freedom and independence as the other states.' The ordinance itself provided for the admission of the new states 'on an equal footing with the original states, in all respects whatever.' So that, it seems to the court, Illinois has as full power and jurisdiction over her navigable streams as Virginia has over the navigable streams within her limits. * * *."

This opinion was approved by the Supreme Court of the United States in Huse v. Glover, 119 U. S. 543, 30 L. Ed. 488, in an opinion by Mr. Justice Field, wherein it is said:

"The opinion of that court presents in a clear and satisfactory

manner the full answer to them, and nothing can be added to the force of its reasoning. In affirming its conclusions we can do little more than repeat its argument. Huse v. Glover, 11 Biss. 550.

The fourth section of the ordinance for the government of the northwestern territory was the subject of consideration in Escanaba, etc. Trans. Co. v. Chicago, 107 U. S. 678 (27; 442). We there said that the ordinance was passed before the Constitution took effect; that although it appears by various Acts of Congress to have been afterwards treated as in force in the territory, except as modified by them, and the Act enabling the people of Illinois Territory to form a Constitution and state government, and the resolution of Congress admitting the State into the Union, referred to the principles of the ordinance, according to which the Constitution was to be formed, its provisions could not control, the powers and authority of the State after her admission; and whatever the limitation of her powers as a government whilst in a territorial condition, whether from the Ordinance of 1787 or the legislation of Congress, it ceased to have any operative force, except as voluntarily adopted by her, after she became a State of the Union; that on her admission she at once became entitled to and possessed of all the rights of dominion and sovereignty which belonged to the original States; that the language of the resolution admitting her was that she is 'admitted into the Union on an equal footing with the original States in all respects whatever;' and that she could, therefore, afterwards exercise the same powers over rivers within her limits as Delaware exercised over Blackbird Creek, and Pennsylvania over Schu-lkill river.

In this opinion the cases of Pollard v. Hagan, Permoli v. Municipality of New Orleans, and Strader v. Graham, supra, are cited with approval.

71 In Cardwell v. American River Bridge Co. 113 U. S. 205, 28 L. Ed. 959, wherein the enabling act for California (Sept. 9, 1850), was construed, the cases of Pollard v. Hagan, Permoli v. Municipality, etc., Strader v. Graham, and Escanaba, etc. v. City of Chicago, supra, as to the foregoing principles, are cited with approval.

In Sands v. Manistee River Improvement Co., 123 U. S. 288, 31 L. Ed. 149, in an opinion by Mr. Justice Field, it is said:

"The Ordinance of 1787 was passed a year and some months before the Constitution of the United States went into operation. Its framers, and the Congress of the Confederation which passed it, evidently considered that the principles and declaration of rights and privileges expressed in its articles would always be of binding obligation upon the people of the territory. The ordinance in terms ordains and declares that the articles 'shall be considered as articles of compact between the original States and people and States in the said territory and forever remain unalterable unless by common consent.' And for many years after the adoption of the Constitution, its provisions were treated by various Acts of Congress as in force except as modified by such Acts. In some of the Acts organizing portions of the territory under separate territorial governments it is declared that the rights and privileges granted by the ordinance

are secured to the inhabitants of those Territories. Yet, from the very condition on which the States formed out of that territory were admitted into the Union, the provisions of the ordinance became inoperative except as adopted by them. All the States thus formed were, in the language of the resolutions or Acts of Congress, 'admitted into the Union on an equal footing with the original States, in all respects whatever.' Michigan, on her admission, became therefore, entitled to and possessed of all the rights of sovereignty and dominion which belonged to the original states, and could at any time afterwards exercise full control over the navigable waters except as restrained by the Constitution of the United States and laws of Congress passed in pursuance thereof."

And again the Permoli, Pollard, Escanaba, and Huse cases are cited with approval.

In Wallamette Iron Bridge Co. v. Hatch, 19 Fed. 352, Judge Deady said:

"Although the grant of power to congress to admit new states into this Union (U. S. Const. art. 4, sec. 3), is unqualified, yet it is well established by the supreme court that congress cannot admit a state upon any other than an equal footing with the other states therein, and therefore cannot, as a consideration of such admission, make any valid compact or enactment which shall deny to such state within its limits the municipal powers common to the others. Pollard v. Hagan, 3 How. 233; Permoli v. New Orleans, Id. 609; Strader v. Graham, 10 How. 92. The act of 1859 admitting Oregon into the Union contains (section 4) four propositions to the people of Oregon concerning the public lands therein, which, in consideration of a valuable grant of public land, they accepted by an act of legislature of June 3, 1859. Or. Laws, 101. * * *"

By the first one, as we have seen, it was simply held that
72 Congress cannot, by any compact or condition made with or laid upon the state on her admission into the Union, restrain or limit her municipal power as such state, but that, if the subject of the compact or condition is within the power of congress to enact or regulate, without the consent of the state,—as to declare that the navigable waters therein shall be 'common highways,'—it is good as in law."

Circuit Judge Sawyer concurred with Judge Deady in the foregoing opinion.

In Willamette Iron Bridge Company v. Hatch, 125 U. S. 1, 31 L. Ed. 629, in an opinion by Mr. Justice Bradley, this case is reviewed, wherein it is said:

"The clause in question had its origin in the 4th article of the compact contained in the ordinance of the Old Congress for the government of the territory northwest of the Ohio, adopted July 13, 1787; in which it was amongst other things declared that 'The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of said Territory, as to the citizens of the United States, and those of any other States that may be admitted into the confederacy without any tax, impost, or duty

therefor.' 1 Stat. at L. 52. This court had held that when any new State was admitted into the Union from the Northwest Territory, the ordinance in question ceased to have any operative force in limiting its powers of legislation as compared with those possessed by the original States. On the admission of any such new State, it at once becomes entitled to and possessed — all the rights of dominion and sovereignty which belonged to them. See the cases of Pollard v. Hagan, (supra); Permoli v. First Municipality of N. O., 44 U. S. 3 How. 589 (11:739); Escanaba Co. v. Chicago; Cardwell v. American Bridge Co.; Huse v. Glover, sua supra. In admitting some of the new States, however, the clause in question has been inserted in the law, as it was in the case of Oregon, whether the State was carved out of the Territory northwest of the Ohio, or not; and it has been supposed that in this new form of enactment, it might be regarded as a regulation of commerce, which Congress has the right to impose. Pollard v. Hagan, 44 U. S. 3 How. 212, 230 (11; 565, 574)."

See also State of Penna. v. The Wehheling, etc., Bridge Co., et al., 13 How. 518, 14 L. Ed. 269.

In Dred Scott v. Sandford, 19 How. 393 (60 U. S.), 15 L. Ed. 718, in an opinion by Chief Justice Taney, it is said:

"There is certainly no power given by the Constitution to the Federal Government to establish or maintain Colonies bordering on the United States or at a distance, to be ruled and governed at its own pleasure; nor to enlarge its territorial limits in any way, except by the admission of New States. That power is plainly given; and if a new State is admitted it needs no further legislation by Congress, because the Constitution itself defines the relative rights and powers and duties of the State, and the citizens of the State and the Federal Government. But no power is given to acquire a Territory to be held and governed permanently in that character."

In the same case, in a separate opinion, concurring, Mr. Justice Campbell said:

73 "This claim to impose a restriction upon the people of Missouri involved a denial of the constitutional relations between the people of the States and Congress, and affirmed a concurrent right for the latter, with their people to constitute the social and political system of the new States. A successful maintenance of this claim would have altered the basis of the Constitution. The new States would have become members of a Union defined in part by the Constitution and in part by Congress. They would not have been admitted to this Union. Their sovereignty would have been restricted by Congress as well as the Constitution. The demand was unconstitutional and subversive, but was prosecuted with an energy and aroused such animosities among the people, that patriots, whose confidence had not failed during the Revolution, began to despair for the Constitution."

In Ward v. Race Horse, 163 U. S. 504, 41 L. Ed. 247, in an opinion by Mr. Justice White, it is said:

"The act which admitted Wyoming into the Union, as we have said, expressly declared that that state should have all the powers of the other states of the Union, and made no reservation whatever

in favor of the Indians. These provisions alone considered would be in conflict with the treaty if it was so construed as to allow the Indians to seek out every unoccupied piece of government land and thereon disregard and violate the state law, passed in the undoubted exercise of its municipal authority. But the language of the act admitting Wyoming into the Union, which recognized her coequal rights, was merely declaratory of the general rule."

Then follows citations, with approval, the case of Pollard v. Hagan, 44 U. S. 3 How. 212; Permoli v. Municipality, etc. 44 U. S. 3 How. 589; Withers v. Bucklet, 61 U. S., 20 How. 84; Escanaba Co. v. Chicago, 107 U. S. 678; Willamette Iron Bridge Co. v. Hatch, 125 U. S. 1, with approval.

In Bolin v. State of Nebraska, 176 U. S. 83, 44 L. Ed. 383, in an opinion by Mr. Justice Brown, it is said:

"The argument of the plaintiff in error in this connection is that by these acts, the people of Nebraska *adopted the Constitution of the United States*, and thereby the first eight amendments containing the Bill of Rights became incorporated in the Constitution of the state, and that the right to proceed for felonies, other than by an indictment of a grand jury (as required by the Fifth Amendment), was taken away from such state.

* * * But this court has held in many cases that, whatever be the limitations upon the power of a territorial government, they cease to have any operative force, except as voluntarily adopted after such territory has become a state of the Union. Upon the admission of a state it becomes entitled to and possesses all the rights of dominion and sovereignty which belonged to the original states, and, in the language of the act of 1867 admitting the state of Nebraska, it stands 'upon an equal footing with the original states in all respects whatsoever.' * * *

74 Not only did Congress in the act of 1867 declare that Nebraska was admitted on an equal footing with the original states, but the whole Federal system is based upon the fundamental principle of the equality of the state*d* under the Constitution. The idea that one state is debarred, while the others are granted, and the privilege of amending their organic laws to conform to the wishes of their inhabitants, is so repugnant to the theory of their equality under the Constitution, that it cannot be entertained even if Congress had power to make such discrimination. We are therefore of the opinion that the provision of the Constitution of Nebraska, permitting prosecutions for felony by information, does not conflict with the Fourteenth Amendment to the Constitution of the United States."

It being within the discretion of Congress to determine when a new state shall be admitted into the Union, it has the arbitrary power, as preliminary to such admission, to require a state to insert a certain provision in its constitution, or to enact such provision as a law by ordinance, but it is not within the power of Congress to require that such be done so as to be irrevocable on the part of the state without the consent of Congress, when it relates to the local

municipal or police concern of the state and is not embraced within any of the delegated powers of the national government.

Louisiana, Ohio, Indiana, Illinois, Michigan and Wisconsin could have adopted the provisions of the ordinance of 1787 as a part of their respective constitutions, or under certain conditions have enacted said provisions into laws by ordinance, and the same would then have been in force in such state, except where it was repugnant to some power delegated to the Federal government. Such seems to have been the intimation in the following cases:

In Permoli v. Municipality of New Orleans, supra:

"* * * the laws of Congress were all superseded by the state Constitution; nor is any part of them in force unless they are adopted by the Constitution of Louisiana as laws of the State. * * *"

In Huse v. Glover, 119 U. S. 543, supra:

"* * * whatever the limitations of a power as a government whilst in a territorial condition, whether from the ordinance of 1787, or the legislation of Congress, it ceased to have operative force, except as adopted by her after she became a state of the Union.

In Sands v. Manistee River Improvement Company, supra, "the provisions of the ordinance became inoperative, except as adopted by them (states)." In Strator v. Graham, supra, "And in the states
75 since formed in the territory, these provisions, so far as they have been preserved owe their validity and authority to the Constitution of the United States and the constitutions and laws of the respective states, and not to the authority of the ordinance of the old Confederation."

In Boyd v. Nebraska, 143 U. S. 135, in an opinion delivered by Mr. Chief Justice Fuller, it was said:

"It follows from these documents that Congress regarded as citizens of the Territory all who were already citizens of the United States, and all who had declared their intention to become such. Indeed, they are referred to in section three of the Enabling Act as citizens, and by the organic law the right of suffrage and of holding office had been allowed to them. Those whose naturalization was incomplete were treated as in the same category as those who were already citizens of the United States. What the state had power to do after its admission is not the question. Before Congress let go its hold upon the Territory it was for Congress to say who were members of the political community. So far as the original states were concer-ed, all those who were citizens of such states became upon the formation of the Union citizens of the United States, and upon the admission of Nebraska into the Union 'upon an equal footing with the original states, in all respects whatsoever,' the citizens of what had been the Territory became citizens of the United States and of the State."

Congress was expressly authorized by section 8 of article 1 of the Federal Constitution to provide for naturalization of foreign subjects, or aliens, permanently residing in the United States.

The enabling act of Indiana (Act April 19, *1916*, provided that the proposed Constitution should not be repugnant to those articles of the ordinance of the thirteenth day of July 1787, which are de-

clared to be irrevocable between the original States and the people and states of the territory northwest of the Ohio river; excepting so much of said articles as relate to the boundaries of the States therein to be formed.

The Ordinance accepting the enabling act, reads in part as follows:

"That we do, for ourselves and our posterity, agree, determine, declare and ordain, that we will, and do hereby accept the propositions of the Congress of the United States, as made and contained in their act of the nineteenth day of April, eighteen hundred and sixteen, entitled 'An act to enable the people of the Indiana Territory to form a State government and constitution, and for the admission of such state into the Union, on an equal footing with the original States.'

* * *; and we do, moreover, for ourselves and our posterity hereby declare and ordain, that this ordinance and every part thereof, shall forever be and remain irrevocable and inviolate, without the consent of the United States, in Congress assembled, first had and obtained for the alteration thereof, or any part thereof."

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In Depew v. Board of Trustees of the Wabash and Erie Canal, 5 Ind. 8, it is said:

"On the 13th day of July 1787, prior to the adoption of the Constitution of the United States, the celebrated ordinance for the government of the territory northwest of the Ohio river was passed, containing, among a great many other stipulations, one providing that the navigable waters, &c., should be free, &c.

Afterwards, in September, 1787, was framed the constitution of the United States which was subsequently ratified by the states, and which, as the states of the northwest entered into the confederacy under it, formed a new compact of government for them, and being later than the ordinance superseded it, so far, at least, as to abrogate all restraints upon the powers, of the states formed out of said northwestern territory, not existing upon the powers of the original states; and so we understand the Supreme Court of the United States, in Pollard's Lessee v. Hagan, 3 How. 212, to have unanimously decided. In other words, the states of this confederacy are equal under the constitution. Everything that one has power to do, each has power to do, so far as restraint from prior compact, or the general government, is concerned."

In Williams v. Hert, 110 Fed. 166, Baker, District Judge, said:

"It is contended by counsel for the petitioner that by the foregoing ordinances and provisions the right of the people of the state of Indiana to trial by jury on an indictment by a grand jury in the case of all felonies is made an irrevocable and inviolate guaranty of their liberties. Hence it is insisted that the constitution and laws of this state authorizing the trial of felonies by the court on an information are invalid, because the congress has never released the state from the obligations of the foregoing acts and ordinances. It is impossible, however, to maintain that the United States holds in trust for the people of the state of Indiana all the great elemental principles of liberty contained in the ordinance and secured by it to the people of

the Indiana territory, during its existence. The people of the state are sovereign, except in so far as their sovereignty has been surrendered to the national government. This state has never surrendered to the general government its powers to provide for the peace and security of the people and to define and punish criminal offenses committed in violation of its laws. It was admitted into the Union 'on an *equal* footing with the original states in all respects whatever.' The ordinance of 1787 and the other acts above quoted have ceased to operate as limitations on the powers of the state. This state possesses all the sovereign powers possessed by any one of the original states of the Union, in all respects whatever. This is affirmed in many cases by the Supreme Court. Pollard v. Hagan, 3 How. 212, 11 L. Ed. 565; Permoli v. First Municipality of New Orleans, 3 How. 589, 11 L. ed. 739; Strader v. Graham, 10 How. 82, 13 L. Ed. 337; Escanaba & L. M. Transp. Co. v. City of Chicago, 107 U. S., 678 2 Sup. Ct. 185, 27 L. Ed. 442; Huse v. Glover, 119 U. S. 543, 7 Sup. CT. 313, 30 L. Ed. 487; Bridge Co. v. Hatch, 125 U. S. 1, 8 Sup. Ct. 811, L. Ed. 629; Bolln v. State, 176 U. S. 83, 20 Sup. Ct. 287, 44 L. Ed. 382."

In Hinman et al., v. Warren et al., 6 Oregon 409, it is said:

77 "But it is contended that this sovereignty did not attach until the state was admitted into the Union. This is true, but it is also equally true that the United States government has no constitutional or statutory authority to so act towards a territory, or so dispose of the lands within a territory, as to make it impossible to admit such territory upon an equal footing with the other states of the Union. In all matters which touch the sovereignty, the general government is, in the very nature of our system, simply a protector thereof until the territory assumes the ample powers of a state, and becomes thereby enabled to assert and protect its own sovereignty. (Pollard's Lessees v. Hagan, supra)."

In Case v. Loftus, — Sawyer —, 39 Fed. 730, 5. L. R. A. (O. S.) 684, Judge Deady said:

"In Hinman v. Warren, 6 Or. 408, the court went further and held that the United States cannot dispose of the tide lands, even in a Territory. This decision is also based on the dogma of state sovereignty,—that is, the sovereignty of a State in futuro, which is yet, so to speak, in utero, or the womb of time and may never be born.

The proposition is supported by the assertion 'that the United States government has no constitutional or statutory authority to so act towards a Territory to so dispose of the lands within a Territory, so as to make it impossible to admit such Territory upon an equal footing with the other States of the Union.'

In Gould on Waters, sec. 40, it is said that this is the only adjudication upon the subject of the power of the national government, 'while holding the title to the soil of the tide waters,' to make a valid conveyance of the same.

The author adds: "The decisions of the Supreme Court of the United States have been thought to lead to the conclusion reached

in Hinman v. Warren, but it would seem that there is no very direct expression of such a view in the opinions of that court.'

The doctrine that new States must be admitted into the Union on an 'equal footing' with the old ones does not rest on any express provision of the Constitution, which simply declares (art. 4, sec. 3): 'New States may be admitted by Congress into this Union,' but on what is considered and has been held by the supreme court to be the general character and purpose of the union of the States, as established by the Constitution,—a union of political equals. Pollard v. Hagan, 44 U. S. 3 How. 233 (11 L. Ed. 575); Permoli v. Municipality No. 1 of New Orleans, 44 U. S. 3 How. 609 (11 L. Ed. 748); Strader v. Graham, 51 U. S. 10 How. 92 (13 L. Ed. 341)."

Supported by Goodtille v. Kibble, 9 How. 477; Doe v. Beede et al., 13 How. 25; Gilman v. Phil. 3 Wall. 726; Munford v. Wardwell, 6 Wall 436; Weber v. Harbor Commissioners, 18 Wall 66; County of St. Clair v. Livingston, 2 Wall, 68; Barney v. Keokuk, 94 U. S. 337; Bridge Co. v. U. S. 105 U. S. 491; Packer v. Bird; 137 U. S. 671; Manchester v. Mass. 139 U. S. 261; Hardin v. Jordan, 140 U. S. 381; Knight v. U. S. Land Ass'n., 142 U. S. 183;
78 Shively v. Bowlin, 152 U. S. 527; Lowdner v. Huntington, 153 U. S. 30; Water Power Co. v. Water Comr. 168 U. S. 360; Niles v. Cedar Point Club, 175 U. S. 308; Scranton v. Wheeler, 179 U. S. 182; Mobile Transp. Co. v. Mobile, 187 U. S. 483; Kansas v. Colorado, 206 U. S. 93; U. S. v. Chandler-Dunbar Co., 209 U. S. 451; Ill. Cent. R. Co. v. Illinois, 146 U. S. 435.

In United States, ex rel., et al., v. U. S. Express Co., 180 Fed. 1006, Rogers, District Judge, said:

"It must therefore be conceded that, when Oklahoma was admitted under the Federal Constitution into the Union as a state, the act of admission gave to her all the powers and devolved upon her all the duties which belong to the other states under the Constitution, anything in the enabling act to the contrary notwithstanding. She could come into the Union in no other way. By virtue of the Constitution her admission fixed her status and that of her people, to the people of other states, to the other states themselves, and to the federal government. Congress cannot exact of a state—even a state coming into the Union—the surrender or waiver of any of the constitutionally inherent powers of sovereignty under the Constitution or such as belong to the other states; nor can a state either surrender or stipulate away any of its sovereignty or render itself less sovereign then the other states."

In Edwards v. Lesueur, 132 Mo. 410, 33 S. W., 1130, it is said: "* * * neither the convention nor the legislature had power, in this respect, to irrevocably bind the people of the State. The right of the people to establish their seat of government at pleasure involves a governmental subject, about which there can be no irrepealable law."

In Armstrong et al. v. Board of County Commissioners of Dearborn County, 4 Blackf. 208, appellants there claimed a vested right in the location of a county seat by virtue of certain legislation at-

tempting to locate forever such seat of county government at a certain point. It is said:

"If the claim be available, it clothes the appellant with the power of controlling the general policy of the State, the rights of the people of that country, and the administration of justice in it. The State itself is stripped of one of the inherent and essential attributes of sovereignty."

In Newton et al. v. Board of County Commissioners, Mahoning County, 26 Ohio State, 618, it is said:

"The power to establish and remove county seats is one which cannot be parted with by legislative contract. It is not the subject of constract. No case of authority is cited by counsel, and it is presumed none can be shown, sustaining or enforcing any
79 such contract; while several cases are adduced (4 Blackf. 208; 8 Texas 297; 11 Ill. 336; 13 La. 456) to show that it is a contract which there is no legislative power to make."

This same case being reviewed by the Supreme Court of the United States (10 Otto 548-563) it is said:

"The police power of the States, and that with respect to municipal corporations, and to many other things that might be named, are of the same absolute character. Cooley Const. Lim. pp. 232; The Regents v. Williams, 9 Gill. & J. 365.

In all these cases there can be no contract and no irrepealable law, because they are 'governmental subjects,' and hence within the category before stated.

* * * The same reasoning pushed a step further in the same direction, would involve the same result with respect to the seat of government of the State.

If the State Capital were sought to be removed, under the circumstances of this case with respect to the County Seat, whatever the public exigencies or the force of the public sentiment which demanded it, those interested, as were the plaintiffs in error, might according to their argument, effectually forbid and prevent it; and this really could be brought about by means of a bill in equity and a perpetual injunction.

It is true the State cannot be sued without its consent, but this would be a small obstacle in the way of the assertion of so potent a right. Though the State cannot be sued, its officers whose acts were illegal and void, may be. Soborne v. Bl. 9 Wheat. 738; Davis v. Gray (supra).

A proposition leading to such a consequence must be unsound. The parent and the offspring are alike. Armstrong v. Comrs. 4 Blackf. 208."

Tucker on the Constitution, page 614, says:

"The states have confided to the Congress as their agent the admission of a State into the Union under the Constitution. Can this constitutional authority in Congress be construed as to invest Congress as an agent with powers to impose conditions upon the new members which the Constitution has not prescribed? And, if so, does the new State enter the Union shorn of its powers pro tanto by the agent authorized to open its doors to the new commonwealth

without any such condition? The better opinion would clearly be that Congress could not impose as an obligation upon a State at the time of its admission into the Union such a restriction as it had no original power to enact or enforce."

Burgess, in his Political Science and Constitutional Law (Vol. 2, p. 163) says:

"The conclusion is that the constitution recognizes no natural right to commonwealth powers in any population, but views these powers as a grant from the sovereign, the State, which latter employs the Congress to determine the moment from which the grant shall be taken.

When the Congress discharges this function, however the commonwealth powers, both as to local government and participation in general government, are vested in the given population by
80 the constitution, not by the Congress. I cannot convince myself that the Congress has the right to determine what powers the new commonwealth shall or shall not exercise, although I know that the Congress has assumed to do so in many cases. I think the constitution determines these questions for all the commonwealths alike. Certainly a sound political science of the federal system could never countenance the possession of such a power by the Congress. Its exercise might lead to interminable confusion. In fact, its possession is inimical to the theory of the federal system. As we have seen, that system can only really obtain, where the power-distributing organ exists back of both the general government and the commonwealths."

Willoughby, in his recent work *in* the Constitutional Law of the United States (Vol. 1 p. 238, 1910), says:

"The Constitution, without distinguishing between the original and new states, define- the political privileges, which the States are to enjoy, and declares that all powers not granted to the United States shall be considered as reserved 'to the States.' From this is almost irresistably follows that Congress has not the right to provide that certain members of the Union, possessing full statehood, shall have their constitutional competences in any manner less than that of their sister States. According to this, then, though Congress may expect of territories whatever conditions it sees fit as requirements precedent to their admission as States, when admitted as such, it cannot deny to them any of the privileges and immunities which the other Commonwealths enjoy."

In Stearns v. Minnesota, ex rel., 179 U. S. 223, 45 L. Ed. 174, in an opinion by Mr. Justice Brewer, it is said:

"When Minnesota was admitted into the Union, and admitted on the basis of full equality with all other States, there were within its limits a large amount of lands belonging to the national government. The enabling act, February 26, 1857 (11 Stat. at L. 166, chap. 60), authorizing the inhabitants of Minnesota to form a constitutional and state government, tendered certain propositions to the people of the territory, coupled in section 5 with this proviso (11 Stat. at L. 167, chap. 60):

'The foregoing propositions herein offered are on the condition

that the said convention which shall form the Constitution of said state shall provide, by a clause in said Constitution, or an ordinance, irrevocable without the consent of the United States, that said state shall never interfere with the primary disposal of the soil within the same, by the United States, or with any regulations Congress may find necessary for securing the title in said soil to bona fide purchasers thereof; and that no tax shall be imposed on lands belonging to the United States, and that in no case shall non-resident proprietors be taxed higher than residents.'

* * * That these provisions of the enabling act and the Constitution, in form at least, made a compact between the United States and the state, is evident. In an inquiry as to the validity, of such compact this distinction must at the outset be noticed. There may be agreements or compacts attempted to be entered into between two states, or between a state and the nation, in reference to political rights and obligations, and there may be those solely in reference to property belonging to one or the other. That different considerations may underlie the quesyion as to the validity of these
81 two kinds of compacts or agreements is obvious. It has often been said that a state admitted into the Union enters therein a full equality with all the others, and such equality may forbid any agreement or compact limiting or qualifying political rights and obligations; *whereas, on the other hand, a mere agreement in reference to property involves no question of equality of status, but only of the power of a state to deal with the nation or with any other state in reference to such property. The case before us is one involving simply an agreement as to property between a state and the nation.*" (Italics Ours.)

The prohibition against compacts or agreements between the several states contained in section 3, articles 4 of the Federal Constitution, without the consent of the Federal Congress, was intended as a limitation upon the states so as to prevent the increase of power among such states by such compacts so that they may not become a menace or interference with the supremacy of the United States in the exercise of its delegated rights of the national power. (Stearns v. Minnesota, supra.) Article 10 (10th amendment) provides that the powers not delegated to the Federal Government by the Constitution, nor prohibited by it to the States, are reversed to the States respectively, or to the people.

A contract or compact may be entered into by the Federal Government with the State or any individual relative to any property held by it under such delegated powers, such contract being sustained on the ground that it related to property or proprietary rights, or with the state relative to matter within the exercise of such delegated or national authority. When it comes to a compact with a state, relative to matters pertaining to its municipal sovereignty, how can it be said that the Federal government is acting by virtue of any delegated powers in making such contract or compact? And if it is not acting within such delegated powers, so far as it seeks to irrevocably restrict the state as to its reserved power, by article 10 its act is void. As was said by Mr. Justice Brewer in Stearns

v. Minnesota, supra, the intention in not permitting states to contract or enter into compacts between themselves, without the consent of Congress, was for the protection of the National government, thereby preventing encroachment against its delegated powers. The converse is true under the provision of article 10, wherein it is expressly provided that all powers not delegated are retained by
82 the State, for by means of compacy the delegated powers could be increased and the retained powers of the state thereby minimized, the Federal Constitution amended by such compact, and the powers of the state relative to municipal sovereignty, reduced and greatly impaired, under the pretense of a contract or compact.

Willoughby, in his late work on the Constitution and Laws of the United States, 1910, (Vol. 1 at page 240), says:

"Beginning with the admission of Nevada in 1864, the promises exacted of Territories seeking admission, as states assumed a more political character. Of Nevada it was required that her Constitution should harmonize with the Declaration of Independence and that the right to vote should not be denied persons on account of their color. Of Nebraska, admitted in 1867, it was demanded that there should be no denial of the franchise or any other right on account of race or color, Indians excepted. Of the States that had attempted secession, still more radical were the requirements precedent to the granting to them of permission again to enjoy the other rights which they had for the time being forfeited. Of all of them it was required that there should be, by their laws, no denial of the right to vote except for crime; and of three, that negroes should not be disqualified from holding office, or be discriminated against in the matter of school privileges. Finally, Utah, when admitted as a State in 1894, was required by Congress by the Enabling Act to make by 'ordinance irrevocable without the consent of the United States and the people of the United States, provisions for perfect religious toleration and for the maintenance of public schools free from sectarian control; and that polygamous or plural marriages are forever abolished.'

It would seem that as regards the enforceability of these contracts, a distinction is to be made between those that attempt to place the State under political restrictions not imposed upon all the States of the Union by the federal Constitution, and those which seek the future regulation of private, proprietary interests.

The first class of these agreements the Supreme Court has repeatedly held are not enforceable against the State after it has been admitted into the Union."

In Blue Jacket (Kansas Indians) v. Board of Commissioners of the County of Johnson, 5 Wall. (72 U. S.) 737, 18 L. Ed. 672, it is said:

"If the tribal organization of the Shawnees is preserved intact and recognized by the Political Department of the Government as existing, then they are a people 'distinct from others,' capable of making treaties, separated from the jurisdiction of Kansas, and to be governed exclusively by the government of the Union. If under the control of Congress, from necessity, there can be no divided authority. If they have outlived many things, they have not outlived the

protection afforded by the Constitution, treaties and laws of Congress. It may be that they cannot exist much longer as a distinct people in the presence of the civilization of Kansas, 'but until they are clothed with the rights and bound to all the duties of citizens' they enjoy the privileges of total immunity from state taxation."

83 This compact comes, not within the class that attempts to place the state under political restrictions not imposed upon the other states of the Union by the Federal Constitution, but within that which seeks the future regulation of granted property or proprietary interests.

Under section 8 of article 1 of the Constitution, one of the specific rights delegated by the several states was to regulate commerce with the Indian tribes. Section 3 of article 4 provides that "Congress shall have the power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in the Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State." Under these provisions the Congress of the United States had authority to regulate the government of this tribe of Indians, the title of said reservation being held by the United States for the benefit of the tribe; just as the title to public — is held by the United States for the benefit of the citizens of all the states.

The compact that was sustained in the case of the Kansas Indians, supra, related to a proprietary interest, and was incident to the exercise, after the admission of the state, of a delegated federal power, and is not in point. As to the case of Biddle v. Green, 8 Wheaton 1, that was a compact by virtue of the first paragraph of section 3 of article 4 of the Federal Constitution, which provided that "New States may be admitted by the Congress into the Union; but no new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States, or parts of States, without the consent of the legislature of the States concerned as well as of Congress."

The 7th article of the compact made between Virginia and Kentucky, as incorporated in the Kentucky Constitution, upon the separation of the latter from the former state, declares that all private rights and interests of land within derived from the laws — Virginia prior to separation shall remain valid and secure under the

84 laws of the proposed state and shall be determined by the laws now existing in this state.

These lands had formerly been the property of the commonwealth of Virginia, having obtained its independence as a result of the Revolution, and succeeded to the proprietary rights of the Crown to the public lands within that state, this compact falls in that class, pertaining to private property or proprietary interests. For that reason it is not a case in point.

Again that part of the compact involved in Green v. Biddle, supra, (7th art.) was incorporated in the Kentucky Constitution and it requires no argument to demonstrate that a statute enacted

by the legislature must fall when coming in conflict with a provision of the Constitution.

The foregoing conclusion as to the effect of the decision in the case of Green v. Biddle, is settled in Kentucky Union County v. Kentucky, 31 Sup. Ct. Rep. at page 181, wherein an opinion by Mr. Justice Day, it is said:

"We think the effect of these decisions is to declare that while the Virginia compact prevents the cutting down of the titles secured under the state of Virginia, prior to its date, so as to take away substantial rights incident to the title, as was the case in Green v. Biddle, supra, it did not mean to prevent the state, upon notice and hearing, from requiring the registration of land titles for taxation, or, in default thereof, from forfeiting such titles to the state. These laws do not have the effect of taking away legitimate rights secured by the old grants, but enable the new sovereign to enforce against such lands, as well as others, the taxing laws of the state. It was, of course, recognized that the land would pass under the dominion of a new state, which would require revenues for its support, and while the title obtained from the state of Virginia was protected, it was not intended that it should be immune from constitutional laws having the effect to subject such lands to the taxing power of the new sovereignty, and to require their owners, by all proper methods, to contribute their share to the public burdens of the state."

In Hogg v. Zanesville Canal and Manufacturing Company, 5 Ohio, 410, it is said:

"This portion of the ordinance of 1787 is as much obligatory upon the State of Ohio as our own constitution. In truth, it is more; for the constitution may be altered by the people of the state, while this cannot be altered without the assent both of the people of this state and of the United States through their representatives. It is an article of compact, and until we assume the principle that the sovereign power of the state is not bound by compact, this clause must be considered obligatory."

85 This case cannot be considered as an authority. In Graham v. Strader, supra, the Supreme Court of the United States held that the ordinance of 1787 fell with the admission of Ohio into the Union and thereafter, had no binding effect upon the State. That has been the universal holding in every state that was carved out of the northwest territory. Not only the Supreme Court of the United States, but the Supreme Court of every other state has so held, except that of Ohio, and that of itself destroys the effect of the holding of this court. But even if the ordinance of 1787 has been brought over by compact under the holding in Pollard v. Hagan, that clause of the ordinance, to-wit: "That the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the said Territory as to the citizens of the United States and those of any other state that may be admitted into the Confederacy, without any tax, impost or duty therefor," could be sustained as a proper exercise of delegated Federal power

by virtue *od* section 8, article 1, as incident to the regulation of commerce, etc. In Pollard v. Hagan, supra, it is said:

"The declaration, therefore, contained in the compact entered into between them when Alabama was admitted into the Union 'that all navigable waters within the said State shall forever remain public highways, free to the citizens of said State, and of the United States, without any tax, duty or toll therefor, imposed by the said State,' would be void if inconsistent with the Constitution of the United States. But is this provision repugnant to the Constitution? By the 8th section of the 1st article of the Constitution power is granted to Congress 'to regulate commerce with foreign nations, and among the several states.' If, in the exercise of this power Congress can impose the same restrictions upon the original States, in relation to their navigable waters, as are imposed by this article of the compact on the State of Alabama, then this article is a mere regulation of commerce among the several States, according to the Constitution, and, therefore, as binding on the other States as Alabama."

The same applies also to Duke v. Chawba Navigation Co., 10 Ala. 82, as the provision there under consideration is the same as that contained in Pollard v. Hagan, and was within the delegated Federal Powers. It cannot be considered in point where it is sought to irrevocably restrict the municipal sovereignty of the State.

In Minnesota v. Batchelder, 1 Wall. 108, 17 L. Ed. 551, the contract related to a grant of public lands or Federal proprietary
86 rights. Cooper v. Roberts, 18 How. 173, 15 L. Ed. 340, pertains also to a compact in which public lands or Federal proprietary rights were granted to a new state. In this case the opinion is by Mr. Justice Campbell. It is difficult to see how this case can be cited to sustain a compact — an irrevocable restriction as to local municipal or police power of a new state, in the light of the excerpt by Mr. Justice Campbell, supra, quoted from the Dred Scott case.

Beecher ex rel. v. Wetherby, et al., 5 Otto, 517, 24 L. Ed. 440, is the same as Cooper v. Roberts, supra, relating to grant of lands and is not in point.

The case of Bennett v. Boggs, Baldwin page 60, 3 Fed. Cases, 221, No. 1, 319, involved the validity of a compact between New Jersey and Pennsylvania, made in 1783. It has never been doubted that the colonies under the confederation had authority to make compacts. The case of Spooner v. McConnell, et al., 1 McLean 337, 22 Fed. Cases 939, No. 13,245 Mr. Justice McLean, sitting on the Circuit, held that certain parts of the ordinance of 1787, under the government of the northwest territory, remained in force in the State of Ohio after its admission into the Union. This decision was rendered in December 1838. That in Strader v. Graham, supra, was made by the Supreme Court of the United States in 1850, wherein the contrary was held, to-wit: That the ordinance of 1787 was superseded by the adoption of the Constitution of the United States, which placed all the states of the Union on a perfect equality, this would not be the case if the *the* ordinance continued to be in force after its adoption. That opinion was fully concurred in by Justice Wayne, McKinley, Daniel, Nelson, Woodbury and Greer. Justice

McLean concurred in the conclusion, and not in that part of the opinion which held that the ordinance of 1787 was superseded by the Federal Constitution. Mr. Justice Catron also took the contrary view to that of the majority. This opinion, with the dissent, shows that Spooner v. McConnell was repudiated by the Supreme Court of the United States.

As to the obiter of Justice McLean in Spooner v. McConnell, et al., supra, wherein it is said.

87 "The state has been admitted into the Union on an equal footing with the original states. And yet the state is bound by compact not to tax the lands of the United States, not until the expiration of five years after they have been sold. The power to tax is an incident to sovereignty. Does this exemption take away or lessen this power. If it does, in the sense contended, then the State of Ohio was not admitted into the Union, with the same powers of sovereignty as the original states. This consequence is not obviated by the fact that this was a restriction imposed with the consent of the state, for an equivalent. If it be an abridgement of the sovereign power of the state, the objection stands in its full force. The compact not to tax was the voluntary act of the people of the state, but *nor* more so than was the compact by the same people that the navigable waters should be common highways. And this exemption from taxation is as much a restriction on the exercise of the sovereign power, as the exemption of the navigable streams from obstruction by the same power. The right to authorize works on a navigable stream, which may, to some extent, obstruct its navigation by the sovereign power of the state, is not less clear, on general principles, than the right to tax. By compact with the federal government, the national road, that lies within the state, is to be kept in repair by tolls imposed by the state for that purpose. The state cannot, under this compact, vacate this road, as it may all public roads established by its authority; and does this compact abridge the sovereignty of the state?"

As heretofore pointed out in Stearn v. Minnesota, supra, there is a distinction between an agreement or compact, qualifying political rights, and one placing restrictions upon property or proprietary rights, which distinction is approved by Willoughby on the Constitution, Volume 1, section 115, page 242. This distum by Mr. Justice McLean does not fall alone by this distinction, but it has been expressly repudiated by the Supreme Court of the United States.

In Stone v. The State of Mississippi, 11 Ot. 814, 25 L. Ed. 1079, wherein the state by quo warranto sought to oust a certain lottery company from doing business in the state, defendant claimed the right under a certain act of the Legislature of issuing and vending lottery tickets, neither the act, nor the Constitution, nor the general laws of the state at any time having reserved the right to repeal the same. The court, in passing on the question, said:

" 'That the framers of the Constitution did not intend to restrain States in the regulation of their civil institutions, adopted for internam government, and that the instrument they have given us is

not to be so construed.' The present case, we think comes within this limitation. We have held, not, however, without strong opposition at times, that this clause protected a corporation in its charter exemptions from taxation. While taxation is, in general, necessary for the support of the government, it is not part of the government itself. Government was not organized for the purpose of taxation, but taxation may be necessary for the purpose of government.
88 As such, taxation becomes an incident to the exercise of the legitimate functions of government, but nothing more. No government dependent on taxation for support, can bargain away its whole power of taxation, for that would be substantially abdication. All that has been determined thus far is, that for a consideration it may, in the exercise of a reasonable discretion, and for the public good, surrender a part of its powers in this particular.

But the power of governing is a trust committed by the people to the government, no part of which can be granted away."

No legislative body or agency on the part of the state, can divest itself or the state of the right to exercise the police power when it is necessary to protect the peace, good morals, health or property of the people. Birmingham Mineral R. Co. v. Parsons, 100 Ala. 662; Barlow v. Gregory, 31 Conn. 261; People v. Hawley, 3 Mich. 330; Beer Co. v. Massachusetts, 97 U. S. 25; Stone v. Mississippi 101 U. S. 814; Slaughter Houses Cases, 16 Wal. 36; Fertilizing Co. v. Hyde Park, 97 U. S. 659; New Orleans Gas Co. v. Louisiana Light Co. 115 U. S. 650.

Hancock v. Washington, 3 Wood, 351, 11 Fed. Cases 403, related to a colonization contract made by the Republic of Texas with an individual, this pertaining to property or proprietary rights and comes within the distinction made in Stearns v. Minnesota supra. Besides, when such contract was made Texas was a republic and not a member of the Federal Union.

In Gray v. Davis, 1 Wood, 420, 10 Fed. Cases, 1007, an act of the Legislature of Texas whereby a railroad company was incorporated and granted lands, was held to be a contract between the state and the company within the meaning of section 10 of article 1 of the Constitution of the United States. This is undoubtedly the law. This case was affirmed 16 Wall. (83 U. S.) 203. The same rule is announced in March et al., v. Burrows, et al., 1 Wood, 464.

In Virginia v. West Virginia, 11 Wall. 39, was involved a compact between two states, which was assented to by an act of Congress, coming within section 3 of article 4 of the Constitution of the United States.

In Fort Leavenworth R. Co. v. Lowe, 114 U. S. 525, the contract was incident to a valid exercise of Federal power under
89 article 1, section 8 of the Federal Constitution.

In United States v. Partello, 48 Fed. 670, it was held that as to Indian reservations, Congress might have jurisdiction over the same and under any treaty made in pursuance thereof. Congress has authority to legislate with reference to the Indian Country, whether it is within a state or territory. U. S. v. Yellow Son, 1,

Dill. 272; U. S. v. McBrackney, 104 U. S. 621; Ft. Leavenworth R. Co. v. Lowe, 114 U. S. 525.

In Dick v. United States, 208 U. S. 338, 52 L. Ed. 521, the syllabus is as follows:

"The words 'Indian country,' as used in U. S. Rev. Stat. section 2139, as amended and re-enacted by the act of July 23, 1892 (27 Stat. at L. chap. 234), forbidding the introduction of intoxicating liquors into such country, do not, standing alone, embrace territory in which, at the time, the Indian title had been extinguished and over which with its inhabitants, the jurisdiction of the state, for all purposes of government, was full and complete.

The stipulation in the agreement of May 1, 1893, between the United States and the Nez Perce Indians, that the Federal laws prohibiting the introduction of intoxicating liquors into the Indian country shall, for a period of twenty-five years, apply to the lands thereby ceded to the United States and to those retained by the Indians and to those allotted to them in severalty, was a valid regulation, based upon the treaty-making power of the United States and upon the power of Congress to regulate commerce with the Indians, and was not an invasion of the sovereignty of the state of Idaho, which had, by the act of 1890 (26 Stat. at L. 215, chap. 556), been admitted into the Union upon an equal footing with the other states."

In that case the contention of the accused was that the United States had no jurisdiction over lands within the state which were owned in fee by white citizens, although they may have once been the property of an Indian tribe, and were acquired by the United States subject to the condition that the acts of Congress relating to a named subject should remain in force, for a prescribed period, over such territory. Relative thereto, in an opinion by Mr. Justice Harlan, it is said:

"In determining the extent of the power of Congress to regulate commerce with the Indian tribes, we are confronted by certain principles that are deemed fundamental in our governmental system. One is that a state, upon its admission into the Union, is thereafter upon an equal footing with every other state and has full and complete jurisdiction over all persons and things within its limits, except as it may be restrained by the provisions of the Federal Constitution or by its own Constitution. Another general principle, based on the express words of the Constitution, is that Con-
90 gress has power to regulate commerce with the Indian Tribes, and such power is superior and paramount to the authority of any other state within shoe limits are Indian tribes. These fundamental principles are of equal dignity, and neither must be so enforce- as to nullify or substantially impair the other. In regulating commerce with Indian tribes Congress must have regard to the general authority which the state has over all persons and things within its jurisdiction. So, the authority of the state cannot be so exerted as to impair the power of Congress to regulate commerce with the Indian tribes."

This act of Congressional legislation was sustained under the pro-

vision of the Federal Constitution (sec. 8 art. 1) specifically granting to Congress the power to regulate or control commerce with the Indians and is a well recognized grant of authority. This decision merely construed that authority to apply to the conditions therein named. But where in the Federal Constitution is there any delegated Federal authority to temporarily designate the capital of a state and to require that sovereign state, admitted upon an equality with the original states of the Union, to stipulate, by irrevocable compact, or otherwise, that it will not remove it for a certain designated time? How can this be said to be an incident to any delegated national authority? U. S. v. Celestine, 215 U. S. 278, arose within the limits of an Indian reservation, as did U. S. v. Sutton, 215 U. S. 291, and was a proper exercise of Federal Power under section 8, article 1 of the Constitution of the United States.

The case of Romine v. State, et al., 7 Wash. 215, 34 Pac. 954, which related to certain lands granted by the Federal Government, to the State involved a property or proprietary interest, and there is no question but that such a contract is binding. We repeat that there is not a solitary adjudicated case where the question was directly involved which has not been repudiated by the United States Court, which holds the Federal Government, except where it is by the exercise of a Federal power which could be exercised by Congress as well after the admission of a state as before, could make a compact and irrevocably limit the police or municipal or internal power of the state after its admission.

In Higgins v. Brown, Judge, et al., 20 Okla. 355, it was held that sections 16 to 20, inclusive, of the enabling act of Oklahoma,
91 Act June 16, 1906, c. 3335, 34 Stat. 276, 277, as amended March 4, 1907, c. 2911, 34 Stat. 1286, 1287, when concurred in by the State of Oklahoma by the adoption of sections 27 and 28 of the schedule to the Constitution, being a proper exercise of power by the Congress under article 4, section 3 of the Constitution of the United States, are valid.

It was held that the offense of murder therein charged came within a local law for the government of territories, the prosecution of which may be continued in the state courts after the admission of such territory as a state, on the theory that had the Indian Territory been treated by Congress as an Indian reservation proper, sections 21 and 25 of the revised statutes of the United States, as a general Federal statute, would have applied, but section 31 of the act of May 2, 1890, c. 182, 26 Stat. 81, specifically causing such statute to apply to the area embraced within the boundaries of Indian Territory, it was as much a local law for the government of the Territory as were the statutes of Arkansas extended to the Indian Territory by said act. This construction is in entire harmony with the decision of the Supreme Court of the United States in Pickett v. United States 216 U. S. 456, 30 Sup. Ct. Rep. 265, wherein it is said:

"It was, therefore, altogether competent for Congress to provide, as it did in the 14th section of this enabling act, for the transfer of jurisdiction in respect of all crimes against the United States—for the act must be read as applying to crimes under the *general*

(Italics our own) criminal law of the United States—to the Federal courts provided by the same act. If this could not be done, the change from a territorial condition to that of a State would operate as an automatic amnesty for crimes committed against the *general* (Italics our own) laws af the United States within districts exclusively under its jurisdiction, and not within the jurisdiction of any State, for the court of the State could not be empowered to prosecute against the laws of another sovereignty."

Section 31 of the act of May 2, 1890, is not a general law of the United States, but one applying specially to the Indian Territory. Said section of the enabling act having provided for the transfer of all pending criminal actions, not transferred to the United States Circuit or District Court in the State, to the State courts to be proceeded with, held and determined by the courts of said states, etc., pursuant to section 22 of the original enabling act, and the
92 constitutional convention, by ordinance irrevocable, accepted the terms and conditions thereof, it is insisted that this is a compact relating to the municipal sovereignty of the State, imposed by Congress. Said case is in point to sustain the irrevocable binding force of the compact, as to the location of the capital. If the crime charged in that case involved the violation of a general statute of the United States, it would be a crime against the national sovereignty, and as said by Mr. Justice Lurton in the Pickett case, could not be delegated by compact or otherwise, to the State *to* prosecute. But when it is an offense against a local or special law of the United States in force in a territory or particular area, Congress, in enacting such special or local law by virtue, of section 3, article 4 of the Constitution of the United States, is the agent of the sovereignty of the state in futuro, or, as has been said, in uturo,—the womb of time. When the state undertook to prosecute such offenses, it was neither adding to nor impairing any local sovereignty. It was assuming burdens formerly borne by its agent. However, it would have been permissable for Congress(the agent), to have constituted a special tribune to have prosecuted these pending cases, or criminal actions that arose, up to the time of the admission of the state, against special or local laws; (Hendrix v. U. S., decided by the Sup. Ct. of the U. S. at its December, 1910 term). When the compact was made as to the prosecution of cases against local or special Federal laws the Federal government under its power to govern territories and to provide in its discretion for the admission of new states, was surrendering a power as to the prosecution of such cases to the new state that it has been exercising for the unborn commonwealth. The same applies also to Ex parte Bailey 20 Okla. 497.

Again, if, as said in the Pickett case, Congress could not delegate, by compact or otherwise, a part of its national sovereignty to the State of Oklahoma, to-wit, could not empower state courts to prosecute crimes committed against the national sovereignty, is not the converse equally true that the state cannot by compact irrevocably surrender a part of its municipal sovereignty?

93 Section 1321, page 200 of Volume 2, Story on Constitutions, 5th edition, is cited by the plaintiff as supporting his

contention, that the compact as to the temporary location of the capital was irrevocably binding. At the time the preliminary acts were taken for the admission of the State of Missouri into the Union, an attempt was made by the House to impose a restriction as to slavery on the state as a condition of its admittance. The debates at that time show that the restriction was imposed in the House by a very small majority, it being strenuously insisted in the debates of that body at that time that the Federal government had no power to irrevocably bind the State as to any internal or municipal governmental power. In the Senate this restriction was *d*tricken out and in lieu thereof a clause was inserted that "all the territory ceded by France to the United States under the name of Louisiana, which lies north of thirty-six degrees and thirty minutes north latitude, not included within the limits of the state contemplated by that act, slavery and involuntary servitude, otherwise than in the punishment of crimes, whereof the parties shall have been duly convicted, shall be and is hereby forever prohibited." None of said territory then was embraced in any state of the Union. In 1854 this act was repealed and one of the reasons given for it was that it was contended that Congress had no right to impose such a condition upon the states after they were admitted. It would seem that the action of Congress on the slavery question, as to the right to impose a restriction upon a state, could not be considered as an authority in favor of or against the plaintiff. As to the requirement of Louisiana that all the proceedings of its courts after it became a state should be printed in the English language, nowhere within the proceedings of that debate is there any contention that the state, within its police power, was irrevocably bound as to such governmental limitations. At the time of the passage of the enabling act for the admission of Utah when the polygamy requirements were inserted as a condition of its admission, nowhere does it appear in the debates to have been urged that the power to irrevocably bind the state as to the exercise
94 of its police or municipal governmental powers was urged. At the time of the passage of the enabling act for the admission of Oklahoma, by far the greater majority of the great lawyers of the Senate specifically stated and urged that it was beyond the power of Congress to shackle an unborn state and bring her into the Union with her police, or local governmental powers irrevocably restricted. Mr. Story in section 1321 supra, cites Biddle v. Green, supra, as an authority that a restriction may be imposed upon a state's sovereignty. In section 1403 at page 276, Story on the Constitution, we find:

"The latter clause, 'compacts and agreements,' might then very properly apply to such as regarded what might be deemed mere private rights of sovereignty; such as questions of boundary; interests in land situate in the territory of each other and other internal regulations for the mutual *com*fort and convenience of States bordering on each other: Such compacts have been made since the adoption of the Constitution. The compact between Virginia and Kentucky, already alluded to, is of this number. Compacts settling the boundaries between States, are, or may be, of the same character. In

such cases the consent of Congress may be properly required, in order to check any infrincement of the rights of the national government; and, at the same time, a total prohibition to enter into any compact or agreement might be attended with permanent inconvenience or public mischief."

Judge Story recognized in Biddle v. Green the same distinction as did Mr. Justice Brewer in Stearn v. Minnesota, supra.

This state was admitted under an enabling act (June 16, 1906), entitled "An act to enable the people of Oklahoma and of the Indian Territory to form a Constitution and state government and *be admitted into the Union on an equal footing with the original states.* (Italics ours.)

Section 30 of the Bill of Rights of the Constitution of Massachusetts, as framed in the midst of the Revolution by a convention composed of such men as Samuel and John Adams, John Hancock, Robert T. Paine, James Bowdoin, Samuel Holton, Nathaniel Gorham, Increase Summer, James Sullivan, Caleb Strong, Levi Lincoln, William Cushing, John Lowell, George Cabot and Benj. Goodhue, is as follows:

In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them: To the end it may be a government of laws and not of men."

95 It has been said that the membership of this convention embraced "a union of talent and patriotism such as the country had never seen up to that time and whose superior has not been seen since." (Robert C. Winthrop's Addresses and Speeches, Boston 1886, Vol. IV. 171.)

The power of the judiciary to declare an act repugnant to the Constitution has been exercised by the Supreme Court of the United States beginning in 1803 with Marbury v. Madison, 1 Cranch, 137, 2 L. Ed. 60 to this day without a single dissent as to such power. With the provision of the 14th amendment that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor to deny to any person within its jurisdiction the equal protection of the laws," resting upon every state, and the Supreme Court of the United States as the final tribunal to determine whether such has been done, it would be futile for a state court at this date to set up the doctrine that this is a government of men and not a government of law.

The different state courts have exercised the power of declaring statutes to be unconstitutional, beginning with Rhode Island in 1787, when the invalidity of a statute passed by the General Assembly of that State in 1786, *a* depriving parties charged with certain offenses of the right of a trial by jury was held to be void (Coxe on Judicial Powers and Constitutional Legislation, pp. 234, 246), and North Carolina, in 1787, the same month when the convention to frame the Constitution of the United States was gathering at Philadelphia,

held an act of the Legislature of that state, depriving certain persons of the right of a trial by jury, to be unconstitutional, saying:

"That by the constitution every citizen had undoubtedly a right to a *deicison* of his property by a trial by jury. For that if the Legislature could take away this right, and require him to stand condemned in his property without a trial, it might with as much authority require his life to be taken away without a trial by jury, and that he could stand condemned to die, without the formality of any trial at all; that if the members of the General Assembly could do this, they might with equal authority, not only render themselves
96 the Legislators of the State for life, without any further election of the people, from thence transmit the dignity and authority of legislation down to their heirs male forever.

But that it was clear, that no act they could pass, could by any means repeal or alter the constitution, because if they could do this they would at the same instant of time, destroy their own existence as a Legislature, and dissolve the government thereby established. Consequently the constitution (which the judicial power was bound to take notice of as much as of any other law whatever,) standing in full form as the fundamental law of the land, notwithstanding the act on which the present motion was grounded, the same act must of course, in that instance, stand as abrogated and without any effect."

In Eakin et al. v. Raub, et al., 12 Sargeant & Rawle (Pa.) 330, the only case where there appears to be even a dissent on the part of the members of the court, it is said:

"Maintaining as I do, the power and the duty of the court to deside on the constitutionality of all the acts of the legislature, yet it is one which all courts will approach with caution and circumspection, and with every proper respect for a co-ordinate branch of the government, and with great reluctance will they pronounce an act of the legislature unconstitutional, and only when it comes in undoubted collision with the constitution of the United States, or with that of this state. But it is a duty, however irksome, which they are bound to perform, without regard to personal considerations; for no principle can be better established,—none more conducive to personal liberty and security of property,—none of which the people of this country can more justly boast,—none which so pre-eminently distinguishes our American constitutions over every other country and government, than the doctrine which has prevailed since their formation, in the courts of all these states from *Maine* to *Georgia that the people possess the sovereign right to limit their law-giver, and that acts contrary to the constitution are not binding as laws.* The concurrence of statesmen, of legislators, and of jurists, uniting in the same construction of the constitution, may insure confidence in that construction."

Section 2 of article 6 of the Federal Constitution, is as follows:

"This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound

thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

How can a judge be bound by the Constitution of the United States and all laws or treaties made pursuant thereto, unless he is to determine whether the same are made pursuant thereto. As a legal question the power of the courts of this Republic to declare an act unconstitutional, when in fact it is, seems to be long ago settled.

97 With every proper and reasonable respect for the co-ordinate branches of the State government and the acts of Congress of the United States under the authorities and reasons heretofore set out, I have reached the conclusion beyond a reasonable doubt, that the unreasonable restriction sought to be imposed upon the state by the Federal Congress is void and with the universal recognized authority of the judiciary to declare not only acts of the Legislature, but also those of Congress, when the question is properly raised and such repugnancy appears to a moral certainty, to be void, it is so declared in this instance.

Neither Congress nor the Constitutional Convention had any power to bind the state irrevocably, by compact or otherwise, as to the location of its seat of government temporarily at the City of Guthrie, and not to be changed therefrom previous to Anno Domini, 1913, and after said year to be located by the electors of said state at an election to be provided for by the Legislature.

As the irrevocable part of the compact at least falls, that is, that part of it wherein it seeks to irrevocably bind the state so that it cannot change the seat of government prior to 1913, nor thereafter except by a vote of the electors of the state at an election to be provided for by the Legislature, the question arises as to whether that part of the compact as a part of an ordinance passed by the convention temporarily fixing the seat of government stands, and if so, what is its effect and how can it be repealed?

7. For the purpose of this case it will be assumed that it stands as a part of an ordinance (State of Penna. v. Wheeling etc. Bridge Co., et al., 15 How. 518) temporarily locating the seat of government at Guthrie. In Frantz et al. v. Autry, 18 Okla. 561, it is said:

"An ordinance as used in this act (referring to the enabling act), has the force and effect of a legislative enactment or law for the purpose therein named. Manifestly, it is a law which is essential to carrying into effect the objects for which the convention was created. Thus we speak of the famous ordinance of 1787, which created a government of that portion of the territory of the United States northwest of the Ohio River, and known as the Northwest Territory.

98 It will thus be seen that congress conferred direct and express power and authority upon the convention to pass an appropriate ordinance to submit the constitution to the people for its ratification or rejection, at an election at a time fixed in said ordinance, by the convention. Such an ordinance, when once adopted by the convention, has the force and effect of a statute law.

The distinction between a constitution and an ordinance is this:

The constitution is a permanent fundamental law of the state. It is of a stable and permanent character. As it appropriately said in Vanhorse v. Dorence, 2 Dall. 308;

'The constitution of a state is stable and permanent, and not to be worked upon by the temper of the times, nor to rise and fall with the tide of events; notwithstanding the competition of opposing interests, and the violence of contending parties, it remains firm and immovable, as a mountain midst the strife of storms, or a rock of the ocean amidst the raging of the waves.'

But under the terms of the enabling act, it is prospective in its operation only. That is, it does not become operative until it is ratified by the people and approved by the President of the United States. On the other hand, an ordinance, as *u*sed in this act, refers to a merely temporary law, its object being to carry into effect the formation of the constitution and fundamental law of the state, to provide a mode of means for an election of a full state government, including the members of the legislature and five representatives to congress, and becomes operative immediately upon its adoption."

Section 22 of the enabling act (June 16, 1906) provided that "the Constitutional Convention provided for herein shall, by ordinance irrevocable accept the terms and conditions of this act."

When the irrevocable part falls, that part of the ordinance, if any remains, is simply an ordinance in a legislative sense. At the time the Constitution was finally framed and submitted by the convention, its members were aware of the construction that had been placed on the term "ordinance" in said en*ba*ling act, by the court in Frantz, et al. v. Autry, et al., members of the convention being attorneys for the side procuring such holding.

Practically all the provisions of the enabling act required to be agreed to or continued by compact by irrevocable ordinance, were incorporated in the Constiution. (See article 1 Federal Rel; article 11 State & School Lands; sections 2, 26, 27, 28 and 36 of the schedule; and paragraph relating to Osage County in section 8, article 17 of the Constitution). Such provisions, except as they may be contracts inviolable, were then subject to amendment under the initiative and referendum provisions for the amending of the Con-
99 stitution, (Sec. 2, art. 5) and article 24 of the Constitution. (Sec. 1, art. 2, Const.) Many provisions in the enabling act were required to be incorporated or provided for in the Constitution, as, for instance, the toleration of religious worship, prohibition as to manufacture, etc., of intoxicating liquor, the assumption of the debts of the Territory of Oklahoma by the state, public schools and the right of suffrage. (See sec. 3 of the enabling act). The fact that the constitutional convention incorporated into the Constitution provisions of the enabling act, other than those specifically required, and omitted that relative to the temporary location of the capital, is significant. And especially is this so, as the convention accepting the terms of the amendments to the enabling act (Mar. 4, 1907), made the same a part of the Constitution, not accepting the same by ordinance. (Sec. 28 of the schedule).

There are only two kinds of provisions known in written law:

one fundamental and subject to be changed only by amendment of the Constitution or new Constitution; and the other legislative or statutory and subject to be repealed by legislative action, or bodies exercising sovereign legislative authority.

If this ordinance is of a fundamental character and not repealable as a statute, it can neither be repealed by the Legislature, nor by the people through the initiative and referendum in a legislative capacity. There being no way provided in the organic law for its amendment or repeal, if it is fundamental law it could only be abrogated by calling a new constitutional convention. The only rational conclusion is that the constitutional convention sought to do only what it was required to do by its acceptance of that provision by an ordinance. Contracts, as a rule by states, and invariably by municipalities, or by ordinances or resolutions, are created by legislative acts. In the Richmond Mayoralty case, 19 Gratt. at page 712, it is said that "if a convention, in framing the schedule, should plainly show an intention to place any of its provisions beyond the control of the Legislature, such provision, being the act of the representatives of the sovereignty of the state without any constitutional restrictions, would be as effectual and binding as if they were embodied in the Constitution itself." Obviously, if such rule applies to the schedule, much more so would it apply to the ordinance, and the burden would rest upon the plaintiff to plainly show that it was the intention of the convention to make such ordinance a fundamental law and place it beyond the power of legislative action. The foregoing provisions incorporated in the Constitution, as well as the history of the action of that convention, stand like a stone wall against such contention.

If it is not irrevocable and the other part temporary, obviously it was not contemplated by the framers, or the people, that it was so fundamental that it could not be changed or repealed by the Legislature, especially when it was specially provided (sec. 7, art. 5 of the Constitution): "The reservation of the powers of the initiative and referendum in this article shall not deprive the Legislature of the right to repeal any law, propose or pass any measure, which may be consistent with the Constitution of the State and the Constitution of the United States."

In section 85, page 84, Jameson on Constitutional Conventions, it is said:

"Ordinary laws are enactments and rules for the government of civil conduct, promulgated by the legislative authority, of a state, or deduced from long established usage. It is an important characteristic of such laws that they are tentatory, occasional, and in the nature of temporary expedients. Fundamental laws, on the other hand, in politics, are expressions of the sovereign will in relation to the structure of the government, the extent and distribution of its powers, the modes and principles of its operation, and the appar-tus of checks and balances proper to insure its integrity and continued existence. Fundamental laws are primary, being the commands of the sovereign establishing the governmental machine, and the most general rules for its operation. Ordinary laws are secondary, being

commands of the sovereign, having reference to the exigencies of time and places resulting from the ordinary working of the machine, Fundamental laws precede ordinary laws in point of time, and embrace the settled policy of the state. Ordinary laws are the creatures of the sovereign, acting through a body of functionaries existing only by virtue of the fundamental laws and espress, as we have said, the expedient, or the right viewed as the expedient, under the varying circumstances of time and place."

A constitutional convention for a proposed state has the inherent authority to do those things that are inherently necessary to create the machinery for the submission of the Constitution to the
101 people for approval or rejection, and to provide a temporary set of officers. (Frantz et al. v. Autry, et al., 18 Okla. 831) That is a legislative act. Likewise it would have the inherent authority to provide a temporary seat of government. This is the exercise of a purely legislative power. When the proposed Congress, as the agent of the unborn sovereign state, provided, as was done in this case (Sec. 4 of the enabling act), that the Constitution shall be submitted to the people for ratification or rejection, at which election "the qualified voters for said proposed state shall vote directly for or against the proposed Constitution, and for or against any provisions separately submitted," it was contemplated that the entire Constitution should be submitted to the people for ratification or rejection. In ex parte Birmingham & A. R. Co., 145 Ala. 504, 42 So. 123, it is said:

"In the case of Stewart v. Crosby, 15 Tex. 546, the ordinance was upheld because it was appended to the Constitution as a part of the fundamental law of the land and was adopted by the people along with the Constitution. Besides, the Supreme Court of Texas, in the case of Quinlan v. H. & T. C. Ry. Co., 89 Tex. 376-377, 34 S. W. 738, in commenting on the Crosby case, supra, says: "We are of the opinion, however, that the ordinance was not valid. The convention which met on June 1, 1868, was assembled in pursuance of an act of Congress passed March 23, 1867. It was called for the purpose of framing a Constitution for the state, with a view to its restoration to the Union. The Constitution to be framed by it was to be submitted for ratification to a vote by the people. See Act Cong. March 23, 1867, secs. 3, 4, 15, Stat. 2; 2 Pasch. Dig. p. 1093. The act of Congress did not invest the Convention with the power of independent legislation. It is true that the question of the propriety of incorporating any specific provisions into the fundamental law was for the sole determination of the convention."

Acts of the constitutional conventions, other than incorporating provisions (fundamental) in the Constitution of the State are here referred to as independent legislation. Where the ordinance is framed as a part of the Constitution it is, of course, a fundamental law, and can only be changed by amendment of the Constitution or a new Constitution. We can find no case in which an ordinance has been held as a part of the fundamental law where the Constitution was submitted to the electors for ratification or rejection, unless the ordinance was also submitted. There are cases in which the ordi-

nance was appended to the Constitution as a part thereof where said Constitution was adopted and promulgated without having been first submitted to the electors for ratification or rejection,
102 holding such ordinance to be a part of the fundamental law. (Kemper v. Hawkins, 1 Va. Cases, 20; Benner v. Porter, 9 How. 235) There is nothing in Willi v. Kalmosch, 109 Va. 475, 64 S. E. 342, to the contrary. We have not been able to find any case holding, the Constitution having been submitted to the electors for ratification or rejection, and an ordinance passed by the same convention not having submitted, such ordinance to be a part of the Constitution or fundamental law of the state. The enabling act for New Mexico and Arizona, June 20, 1910 (U. S. Stat. 2nd Sess. 61st Cong. part 1, 559, 560, 570 and 571), provides that such convention shall provide by ordinance irrevocable, "No election shall be called or provided for prior to the thirty-first day of Dec. 1925," and that such ordinance by proper reference shall "be made a part of any Constitution that shall be formed." Obviously this is a Congressional interprepation that when the Constitution is to be submitted to the electors for ratification or rejection, an ordinance not also submitted does not become a part of the fundamental law of the state. This ordinance comes under the head of "independent legislation" defined in Stewart v. Crosby, supra, and approved in ex parte Birmingham & A. R. Co. supra.

The views herein expressed as to the invalidity of the enabling act pertain only to that provision of the same locating the capital and prohibiting the removal of the same prior to 1913, and have no reference to those provisions granting lands or money to the state, or pertaining to matters incident to the exercise of delegated federal powers.

The questions of law here involved no doubt affect many parties intensely. I have nothing to do with the policies, the motives, or the acts, that brought about such conditions. That was a matter for the consideration of other departments of this state government and their constituencies. The conclusions herein reached as to the law, are, to my mind, clear. And such being the case my duty is plain. The demurrer to the plaintiff's petition is sustained, petition dismissed and judgment rendered against the plaintiff.

Turner, C. J. and Hayes, J. concur. Dunn and Kane, JJ. dissent.

103 In the Supreme Court of the State of Oklahoma.

(Filed 9th Day of February, 1911.)

No. 2225.

W. H. COYLE, Plaintiff,

v.

THOMAS P. SMITH et al., Defendants.

DUNN, *J.*, dissenting:

To the conclusion reached in the majority opinion of this court that the ordinance irrevocable passed by the constitutional conven-

tion was merely a law which the state legislature was authorized to repeal and that it could permanently locate the state capital without submitting the question to a vote of the people, I am constrained to dissent. Congress in the enabling act, approved June 16, 1906, made as one of the conditions for the admission of the state, that the citizens occupying the territory embraced within its boundaries should in accordance with Sec. 22 of said act, accept and pass an irrevocable ordinance, providing that "the capital of said state shall temporarily be at the city of Guthrie, in the present territory of Oklahoma, and shall not be changed therefrom previous to Anno Domini, 1913, but said capital shall, after said year, be located by the electors of said state at an election to be provided for by the legislature." The acceptance of the terms of the enabling act and this provisions was made a prerequisite condition on the part of Congress for the authority mentioned in Sec. 2 of said act, granted to the people concerned, authorizing them to vote for an- cho-se delegates to a constitutional convention for the proposed state. This acceptance, then, was to these people, a fundamental prerequisite condition, without which there would have been no statehood. Congress is vested with absolute authority to admit states and it may do so upon such terms and conditions as it chooses. The enabling act was
104 a proposal on the part of Congress, which on its acceptance and a compliance with its terms, there was pledged to our people, statehood. The majority opinion of this court holds that such an irrevocable compact was void and that the people of the state could not lawfully enter into the same and that if they attempted to do so, that they could not be bound thereby for the reason that it involved the yielding of a portion of their sovereignty which they lacked the power to do. Granting for the sake of this discussion that this is true, and that the compact feature must fall, yet it must be admitted that when the sovereign people of the state read the enabling act and understood its meaning, and then elected delegates to attend a convention, that in so far as they could, they approved and ratified the same knowing that one of the acts which the delegates selected by them would be required to do in order to secure and attain the end sought, was the approval of the act by the ordinance irrevocable. Therefore, when they selected their delegates and sent them to the convention, to the extent which they could, which involved all the power they possessed, they empowered them and made the act of the delegates and the convention, their act. Chief Justice Marshall in the celebrated case of Marbury v. Madison, 1 Cranch, 137, said, "that the people have an original right to establish for their future government, such principles as in their opinion shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected." There is no power in any state superior to the sovereign will of the people, and when that will is expressed and can be understood, it is binding upon every governmental agency established. The constitution of a state is neither more nor less than law.

Mr. Bryce in his excellent work on the American Commonwealth, Vol. 1, p. 436, says:

"A state constitution is really nothing but a law made directly by the people voting at the polls upon a draft submitted to them. The people of the state when they so vote act as a primary and constituent assembly, just as if they were all summoned to meet in one place like the folk-motes of our Teutonic forefathers, it is only their numbers that prevents them from so meeting in one place, and oblige the vote to be taken in a variety of polling places."

105 It is true it is the supreme law, but it is the only law in the end, and remains extant and demands recognition to the full extent its makers will it. The government established under it is just such as those who ordain it create, and that government has just such authority as those establishing it invest in it, and when the people of the state elected the delegates to the convention as authorized by the enabling act, their instructions to them to accept the terms thereof was an investment of complete and supreme authority from all the people to do for them this act. The purpose of their election and prime duty was to convene and to pass the ordinance irrevocable under which they were authorized to assemble, and with this for a foundation, it was then their duty to write a constitution. The fact that this condition was onerous or burdensome or one which every elector of the state would have declined to make, had he had his free and untrammeled choice, is not open to assertion and if it were, it would in no wise change the situation.

The Supreme Court of the United States in the case of White v. Hart, 13 Wall. 646, referring to a provision inserted in the constitution of Georgia, which it was asserted was not binding upon the state because it was adopted by distation and coercion, says:

"The state is estopped to assail it upon such an assumption. Upon the same grounds she might deny the validity of her ratification of the constitutional amendments. The action of congress upon the subject cannot be inquired into. The case is clearly one in which the judicial is bound to follow the action of the political department of the government, and is concluded by it."

Just as in this case, we are bound by it if we can ascertain what it is.

The acceptance of this provision has been variously denominated an agreement, contract, or compact, but it was such a one as the Supreme Court of the United States in the case last cited and in the cases of Newton v. Commissioners, 100 U. S. 548, and Green v. Biddle, 8 Wheat. 1, held to be a governmental subject involving public interests and that although as a compact it fell, a legislative

106 act concerning it was necessarily a public law. So that should the compact or agreement which it was here sought to enter into fall as between the state of Oklahoma, and the government of the United States, it remained yet as a law dictated and directed, passed and adopted in accordance with the express mandate of the whole people, and until abrogated by them in some lawful manner, must be held valid and binding. In accordance with the terms of the act, and in keeping with the command of the people who elected and sent them there, the delegates in the convention assembled and passed the ordinance in which it was ordained that they irrevocably

accepted the terms and conditions of the act, thus complying with the terms of the commission under which their election was authorized and the convention held. Thereafter, and in accordance with an ordinance duly passed, provided for in the enabling act, the constitution, the creation of which depended upon the acceptance of the act in question, was submitted to the people and adopted. Thus, we see that we have not only the previous authorization of the people of the state for the adoption of the irrevocable ordinance, but we have in substance its subsequent ratification, for in the adoption of the constitution, the people ratified the acts of the convention upon which its adoption depended. Here, then is a double manifestation on the part of the people of their will in reference thereto. The terms of the constitution aside from those provided for in the enabling act were unknown to the people of the state prior to their being framed by the convention, and submitted for adoption, so that the constitution itself has less evidence of sanction at the hands of the people of the state than had this irrevocable ordinance, for this was not only known when the convention submitted its work to the people for their adoption or rejection, but it was known that its adoption was the sine qua non to any constitution or any state at the time of the meeting of the people in the districts and the selection of the men to prepare and write the constitution. We are told, however, that it must fall as a compact and that involving a political and governmental subject, and hence sovereignty, that the people of the state could not barter it away for statehood; that they
107 could not as to it irrevocably bind themselves to congress nor against themselves. Granted; but as we have seen, in the case of Newton v. Commissioners, supra, and the other cases cited, it remains with us as a law of some kind. Now let us see what kind of a law it is. The people of the state ordained as plainly as it was possible for them to do, that it was an irrevocable law. That is, as plainly and as far as they could, they said to each other, the people of the United States, and the world, we *fill* here make a law which until 1913, we agree we shall be unable to repeal. It shall be to us and our people, irrevocable. It is a plight, a compact, an agreement, and we pledge our sovereign will to respect it as such. By doing this we will be permitted by our sister states to relieve ourselves of the conditions under which we have for many years travailed and enjoy the rights and privileges of the other states of the union. We will adopt and accept this and then we shall be permitted to send two senators and five representatives to the congress of the states. We will adopt this and shall receive as a bounty from the states of the union, five millions of dollars. If we adopt this we shall receive almost untold millions in public lands belonging to the people of the union. These are some of the things which will come to us and our state by its acceptance and we give our pledge and word to all that we will abide by it. For the sake of argument, as we have seen, I grant that the irrevocable part of it must fall so far as the people of the state in their sovereign capacity *is* concerned. I grant that they did not legally bind themselves. I grant and yield all of this, but I assert that the people, although unable to bind themselves in the

passage and adoption of this act, have intended to and have bound their agencies and every department of government which they established, and have proclaimed that they desired to reserve the right to themselves by their votes to locate their state capital. And the fact that they limited the power of the legislature to the calling of the election thereon, reinforces the argument that the people did not intend that body to act finally. They have done this because
108 they could do it and because the plain written language of the law which they passed, has done it. On this point Mr. Jameson in his standard work on Constitutional Conventions (4th ed.) Sec. 351, p. 342, discussing the question as to the extent that the people could be bound by ordinances of a constitutional convention, and speaking of the possibility of the sovereign people to limit or restrict itself, said:

"It (the convention) may recommend constitutional provisions, which, if adopted and put in force by the sovereign, will bind the latter, so far forth as it can be bound at all, but in that case it would be the sovereign which would limit or restrict itself, not the convention which would bind it. And that the sovereign can limit or restrict itself is a well settled principle. The bonds, however, by which it can bind itself, are doubtless only moral ones, since under whatever limitations the nation may have placed itself by voluntary regulation, it has evidently at all times the physical ability to disregard them. In one view, however, these bonds are of immense practical efficacy; *it is only the sovereign body which can disrupt them with impunity. Its servants, the various departments of the government, are obliged to respect them or render themselves obnoxious to punishment for disobedience.*"

In this case it must be conceded that the sovereign body of the people, while possessing the physical ability to disregard the moral obligations which it has assumed, has done all that it could to irrevocably bind every department that it could bind, and as is said by Mr. Jameson, its servants and the various departmen-s of government are bound because the sovereign had the power to bind them and if they ignore it, they thereby render themselves obnoxious to punishment. Nor would this part of the act fall because another element or portion is unconstitutional and unenforceable, provided the constitutional and unconstitutional provisions are severable and distinct, and the presumption not obtaining that the constitutional portion would not have been adopted had the law-making body for-seen that the balance would have been held invalid. The universal rule on this proposition is laid down in Vol. 1 of Lewis' Sutherland Statutory Construction, (2nd ed.) at Sec. 296, as follows:

"Where a part only of a statute is unconstitutional and therefore void, the remainder may still have effect under certain other conditions. The court is not warranted in declaring the whole statute void unless all the provisions are connected in subject-matter, depend on each other, were designed to operate for the same purpose, or are otherwise so dependent in meaning that it cannot be presumed that the legislature would have passed one without the other. The

constitutional and unconstitutional provisions may even be
109 expressed in the same section, or even in the same sentence,
and yet be perfectly distinct and separable, so that the first may stand though the last fall."

It is unnecessary to cite authorities to support a proposition so well established, but the following among a large number of others cited to support the text, are noted: Commonwealth v. Hitchings, 5 Gray (Mass.) 482; Robinson v. Bidwell et al., 22 Cal. 379; In re Abel, 10 Idaho, 288, 77 Pac. 621; People ex rel. v. Kenney, et al. 96 N. Y. 294; see also In re County Com'rs of Seventh Judicial District, 22 Okla. 435.

The court of appeals of New York in the case of People ex rel. v. Kenney et al., supra, in the syllabus laid down the rule as follows:

"The fact that part of a statute is unconstitutional, does not authorize the court to adjudge the remainder void, unless the provisions are so inter-dependent that one cannot operate without the other, or so related in substance and object that it is impossible to suppose that the legislature would have passed the one without the other. The question is not whether the good and bad portions are in the same section, but whether they are essentially and inseparably connected in substance. If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that whigh was rejected, it must be sustained."

In the present case it is not only not impossible to suppose that the convention or people would have passed one section or element of this ordinance without the other, but it is impossible to suppose from the nature of the case, that they would have done otherwise than they did, had they known and foreseen that they would be held to be unable to bind themselves. Under the plain language of the act, they not only made it irrepealable as to the legislature and all other of their agencies, but they made it irrevocable as to themselves which would include all of the subordinate authorities. This being true, and expressing a willingness to bind all the sovereignty, there can be no doubt of their willingness and intention to bind all its parts and all of the agencies to whom they had parcelled it. So that, should the act fall as a compact, and should it fall as an irrepealable law as to the people themselves, why are not the portions not unconstitutional, still left as a law valid and enforceable against everybody but the people?

110 It is contended or insisted that the act of the people in retaining within their own hands the right and the power to locate their state capital was void; it is a power which always has existed and is generally dealt with by constitutional conventions in organizing a state government, and it is admitted that it is some kind of a law, but assumed to be a statute, and hence subservient to the will of the legislature. Viewing it as I do, that it is not *be* classed as a statute, I invite attention to the classification in which such laws have usually been placed by law writers and jurists.

Mr. George F. Tucker, Lecturer on International law in the

Boston University School of Law and Author, and who prepared the article on Constitutional Law in CYC. 8 Cyc., 724, speaking on reference to the ordinances and schedules appended to constitutions, says:

"Ordinances and schedules appended to constitutions are generally a part of the fundamental law and binding upon all the departments of the state."

Mr. Black in his Law Distionary, at page 855, defines the word "Ordinance," as follows:

"A rule established by authority; a permanent rule of action; a law or statute. In a more limited sense, the term is used to designate the enactments of the legislative body of a municipal corporation. The name has also been given to certain enactments, more general in their character than ordinary statutes, and serving as organic laws, yet not exactly to be called 'constitutions. Such was the 'Ordinance for the government of the Northwest Territory,' enacted by congress in 1787."

In this connection, however, I may say that I am rather indifferent to classification and terminology. Lincoln once said, "Suppose we call a dog's tail a leg, how many legs would he have?" To call this act by one name or another will neither raise it or lower it from the exact standard which it possesses. If it is as to the legislature of the state an irrepealable enactment, then they cannot destroy it. If it is a void or as to them a repealable ordinance, then no obstructions meet them in dealing with it. It was, however, as we have seen, an act of law called an ordinance authorized and required by act of congress and passed on the demand of the people of the state by the convention, assembled at their behest for
111 the purpose of passing it and in which it is declared when reduced to its lowest possible terms, that we reserve unto ourselves the right to deal with this particular subject. Had the people the right and power and did they when they thus spoke, pass the act as a law and make it a part of the fundamental law of the state, and did they accomplish the purpose and the end which they there sought, or may one of their agencies, contrary to their express will, strike it down? The answer to this depends upon the powers of the convention. Let us therefore investigate them to see if they support the assumptions heretofore indulged. Constitutional conventions may with reference to their powers, be divided into two great classes. First, there is the revolutionary or spontaneous convention which arises out of a call by the people. These bodies have at different times, assembled to write and adopt constitutions, and the people acquiescing in them, without a submission of their provisions for their adoption or rejection have enabled their work to pass for the constitution of the state. These bodies assumed the power to definitely legislate and their acts stood and were valid because the people acquiesced therein; and no body has ever claimed an ordinary legislature could repeal them. Then, there is a second class which are conventions called in accordance with law, and these bodies have uniformly possessed just the power to do the things the law of their being granted them the right and the authority to do. Where they

were authorized to frame a constitution and to submit the same to the people of the state for adoption or rejection, and this was the limit and scope of their authority, any act of theirs not adopted and accepted by the people has very generally been held to be without force or authority, but the acts of these bodies when not required, to be submitted, if within the scope of the warrant or law under which they were called, have been complete, final, and binding. Mr. Jameson at Sec. 367 of his work cited above, says:

"We have seen that both conventions and legislatures are agencies appointed by the sovereign for purposes of its own, connected with the formation, the renewal, or the operation of government, the function of each being a legislative one, that to the former are instructed certain duties relating to the framing of the *fundamental laws, extending in some cases, according to their commissions, to the definitive enactment of them.*

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Hence, according to the commission of the convention, it may definitively enact fundamental laws by which the people will be governed; this because the law of their being permitted or required it. It is to be noted that Mr. Jameson uses the phrase "fundamental laws," and states that a constitutional convention according to its commission, may be entrusted with the duty of definitively enacting them. There is no question in the minds of any that had the ordinance in question been embodied within our constitution and made a part of it, that the legislature could not have repealed it. It would have been placed where it would have required a vote of the people to have changed it. Did not the fact then that the constitutional convention was empowered with the authority and held a commission authorizing it to definitively and finally pass this, as an irrepealable act, vest it with the power to do so and to make of it as is termed by Mr. Jameson and other law writers, a "fundamental law?" It is solely a question of power. Out of one hundred—fifty-seven state constitutions which had been adopted in whole or in part by the different states of the union up to the time when Mr. Jameson issued the fourth edition of his book, fourty-four thereof were adopted either under enabling acts of congress, or acts of the legislature authorizing the convention assembled to adopt finally its act or acts as the constitution for the people whom they served. Their acts were like the acts of this convention on the ordinance within the terms of the law of their being and were valid and binding solely because of that fact. The question now before us was raised in the supreme court of Mississippi in the case of Sproule v. Fredericks, 69 Miss. 898, 11 So. 472, wherein a part of a constitution prepared by a state convention and not submitted to the people but promulgated as the act of the convention under legislative authority, was assailed on the ground that it had not been submitted to and adopted by the people. Speaking to this question in the case noted, Justice Woods, said:

"The validity of the constitution of 1890 is called into question by counsel for appellee, in a supplemental brief filed recently, by consent of the court, and, as the challenge meets us on the threshold of the case, we proceed at once to its consideration.

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briefly. In support of this view of the invalidity of the constitution, two propositions are asserted: (1) A constitutional convention has power only to prepare or frame the body of a constitution, and that when prepared or framed the instrument is of no force or effect until ratified, by a popular vote of the people, and the constitution of 1890, having never been submitted to or ratified by the people, is invalid; and (2) the changes made by the constitution in the basis of suffrage are violative of the act of congress readmitting the state of Mississippi into the union in the year 1870, and invalidate that instrument. With confidence, we reject both propositions as unsound. It will be remembered that the case at bar is free from the difficulties which are supposed by some writers to arise out of a failure or refusal of a constitutional convention to yield to the direction of the legislature which summoned it that the constitution framed shall be submitted to the people for ratification. The act of the legislature which provided for the assembling of the constitutional convention of 1890 declared that the end sought to be attained, the work to be done, was the revision and amendment of the constitution of 1869, or the enactment of a new constitution; and it did not attempt to limit the powers of the convention by imposing, or seeking to impose, upon that sovereign tribunal the mere legislative will that the constitution enacted should be submitted to the people for ratification. We have simply the case of a constitutional convention enacting a new constitution, and putting it into effect without an appeal to the people in strict conformity to the legislative call which assembled it. We have spoken of the constitutional convention as a sovereign body, and that characterization perfectly defines the correct view, in our opinion, of the real nature of that august assembly. It is the highest legislative body*b* known to freemen in a representative government. It is supreme in its sphere. *It wields the powers of sovereignty, specially delegated to it, for the purpose and the occasion, by the whole electoral body, for the good of the whole commonwealth.* The sole limitation upon its powers is that no change in the form of government shall be done or attempted. The spirit of republicanism must breathe through every part of the framework, but the particular fashioning of the parts of this framework is confided to the wisdom, the faithfulness, and the patriotism of this great convocation, representing the people in their sovereignty. The theorizing of the political essayist and the legal doctrinaire, by which it is sought to be established that the expression of the will of the legislature shall fetter and control the constitution-making body, or, in the absence of such attempted legislative direction, which seeks to teach that the constitutional convention can only prepare the frame of a constitution and recommend it to the people for adoption, will be found to degrade this sovereign body below the level of the lowest tribunal clothed with ordinary legislative powers. This theorizing will reduce that great body, which in our state, at least, since the beginning of its existence, except for a single brief interval, in an exceptional period, by custom and the universal consent of the people, has been regarded as the repository and executor of the

powers of sovereignty, to a mere commission, stripped of all power and authorized only to make a recommendation."

To pass this ordinance then, was within the authority granted to and vested in the convention, and to say that any authority less than the people can repeal it, will, as is said by the court from which we last quoted, degrade the sovereign body of a constitutional convention below the level of the lowest tribunal clothed with ordi-
114 nary legislative powers, for this is necessarily involved in the assumption that the act can be repealed by the legislature. Mr. Jameson at Sec. 103 of his work speaks to the same subject, but with greater particularity upon the definite proposition now before us. He says:

"Besides schedules, there are appended to many constitutions acts adopted by conventions, called ordinances. Not all ordinances, however, are so appended, or have any direct relation to constitutions. They are in their nature resolutions of the bodies adopting them, but taking the name, ordinances, to distinguish them from the similar acts of legislative bodies, denominated resolutions, which may be adopted by the houses severally or jointly. Within the scope of the powers of a convention, ordinances may be valid and effectual according to their terms and purpose. If they are employed to provide for temporary emergencies of the convention, and do not transcend the limits of its powers as defined or implied in the act calling it, they are valid. If they are appended to the constitution, and with it are submitted to the people for adoption or rejection, when submission is not dispensed with, and with it adopted, they are as valid as any part of the constitution, and are equally binding upon the various departments of the government."

If Mr. Jameson may be considered an authority upon the power which may be lawfully exercised by constitutional conventions, and if authority should be deemed necessary for that which appears to be so manifestly self-evident, in the foregoing quotation, we have an absolute expression covering this question. Of the authorized ordinances passed by the convention, I repeat, "If they are appended to the constitution (And with it are submitted to the people for adoption or rejection,"—now mark you—"*when submission is not dispensed with*, and with it adopted) they are as valid as any part of the constitution and are equally binding upon the various departments of the government." This sentence then, reading it with particular reference to the subject before us, means as I view it, that if the authorized ordinances are adopted by a convention with vested authority to adopt, they are as valid as any part of the constitution and are equally binding upon the various departments of the government. Some stress seems to be placed on whether the ordinance is appended to the constitution; we see no force in this. Certainly the mere clerical act of appending the paper containing the written ordinance to the document would give it no weight it would lack in the absence of this. The question is, did the power exist
115 to adopt it and was it adopted by the convention and not where some clerk of that body placed it. To have appended this ordinance to the constitution (if it was not done) would not

have given it any element it did not have without that act, for it was not intended to be voted on by the people, but to be definitively enacted by the convention. The certificate of the president of the convention shows that the ordinance "passed and engrossed, was engrossed with the engrossed copy of the constitution on parchment, was read as engrossed and roll call had thereon and the same duly authorized by a majority of the votes of all the delegates elected to and constituting this convention." If a constitutional convention may adopt a constitution for a people because the law calling it together authorizes it to do it, and its act be final without submission to the people, then there is no reason in logic or law why it cannot do so on less than a constitution and its act likewise be final. To hold otherwise as I view it, violates the fundamental principles recognized by every state in the union; violates the plainest dictates of reason, to say nothing of the authorities which have spoken on the subject.

The ancient case of Kamper v. Hawkins, 1 Virginia Cases, 20, decided in 1793, contains a discussion of the question which is before us, which, while not involving ordinances of a convention created as was ours, presents and confirms the views we have here expressed in reference to the binding force of ordinances passed with the intention that they should arise to the dignity of fundamental law. Manifestly as appears from the case an attempt had been made as in this instance to abrogate by legislative act, one of the ordinances passed by the convention of 1776. The deputies or delegates comprising this convention were chosen by the people and the authority given them was "to consult of and take care of their most valuable interests." The convention thus called established a bill of rights and a constitution which was not submitted to the people for their approval, adoption, or rejection. In the consideration of the question of whether one of the ordinances so called, passed by this convention was subject to repeal by the legislature, Judge Nelson,
116 discussing this question, said:

"But it may be objected that, although the legislature would be bound by a fundamental regulation, made by a convention or other body delegated expressly for such a purpose, the body who formed this, not having been this specially appointed,—this act possesses not sufficient sanctity; but is an act equal only to those of a common legislature, because some acts passed in the same session are confessedly so. Here let it be remembered that the question is not whether the people can change it; but whether the legislature can do so. As to the powers of the convention, this body seems to have been appointed not only to see that the commonwealth sustained no injury, but also to consult in general for the public good, and in such a crisis as that at which our government was formed, those who are delegated have authority more extensive than a legislature appointed under a government, one object of which is to restrain that as well as the other departments,—whereas in the former case the people alone can decide whether these powers have been strained too far. *As to some acts of the same session being temporary and others revocable by the legislature. I answer that the subject-matter of*

them will evince which are intended to be of this nature, and if any were designed to be permanent, they must be so changed by the people, unless indeed calling these ordinances and the other a constitution, sufficiently manifests a design that this should be of a higher authority than those."

From the facts of the case and this discussion, it will be seen that although the ordinance passed by that convention was not embodied in the constitution itself, the court in the consideration thereof held as we have seen, that if it was designed to be permanent, it would be so until changed by the people, unless, as is suggested, the calling of one class of enactments of the convention, ordinances, and the other, the constitution, would manifest a different design. Judge Roane also delivered an opinion for the court. He manifestly classed these so-called ordinances as part of the constitution, for discussing the question before the court in that case he says:

"This constitution is sanctioned by the consent and acquies-ence of the people; and it is admitted by the most universal opinion of the people, by the repeated adjudications of the courts and by many declarations of the legislature itself, to be of superior authority to any opposing act of the legislature."

Judge Nelson in his discussion seemed to consider that the legislature would be bound by what he terms "a fundamental regulation made by a convention." This appears, so far as we have been able to discover, the earliest denomination of that class of laws passed by a constitutional convention other than either the election ordinance, the schedule, or the constitution itself, as a fundamental regu-
117 lation or a fundamental law as these provisions have been called by later text-writers and jurists.

The rule laid down in the foregoing case that the intention of the constitutional convention would prevail, receives further support in a later case from the Court of Appeals of Virginia, the Richmond Mayoralty Case, 19 Grattan, 673, 712, decided in 1870. This case is approvingly cited and quoted from by the same court in the later case of Willis et al. v. Kalmbach et al. (1909) 64 S. E. 342, from which we extract the following:

"It is true that in the interpretation of all writings words must be construed with reference to their plain and ordinary meaning, and, if possible, every word must be given its due force and effect; but in the effort to give to words their due force, we must not lose sight of other parts of the instrument, but each part must be construed with reference to the whole, so as to make it harmonious and sensible as a whole. As was said by Judge Moncure in the Richmond Mayoralty Case, 19 Grat. 712: 'The office of a schedule is to provide for a transition from the old to the new government, and to obviate inconveniences which would otherwise arise from such transition.' Elsewhere in the same opinion it is said that, 'if a convention in framing the schedule should plainly show an intention to place any of its provisions beyond the control of the legislature, such provisions, being the act of the representatives of the sovereignty of the state without any constitutional restrictions, would be as effectual and binding as if they were embodied in the constitution itself."

In the case at bar there were not only no constitutional restrictions, but a positive mandate to pass this ordinance and an intention was plainly shown to place it beyond the reach or control of the legislature for the provision is that it shall be irrevocable by even the people themselves.

The phrase applied to ordinances of this character is again placed in the category of "fundamental law," and receives recognition in the case of Stewart et al. v. Crosby, 15 Tex. 546, wherein the supreme court in the syllabus said:

"We think it free from doubt that the ordinance appended to the constitution is a part of the fundamental law of the land. Having been framed by the convention that framed the constitution of the state, and adopted by the convention and the people, along with the constitution, it is of equal authority and binding force upon the executive, legislative and judicial departments of the governments *of the government* of the state, as if it had been incorporated in the constitution forming a component part of it."

The ordinance referred to was attached to the constitution of 1845, and was held as we have noted, a part of the "fundamental law of the land." The convention promulgating this constitution claimed and had no independent legislative authority. The
118 constitution promulgated was the one under which the republic of Texas was admitted as one of the state- of the union. It will be noted that the ordinance adopted was an ordinance and not a part of the constitution, but the convention lacking independent legislative authority to pass a valid ordinance free of its acceptance by the electors, submitted the same, and notwithstanding the fact that it was termed an ordinance, it was held to be of equal authority with the constitution, binding upon the executive, legislative, and judicial departments of the state, as if it had been put into the constitution and forming a component part thereof. In the case of Grigsby v. Peak, 57 Tex. 142, the court passed upon the validity of an ordinance of the convention of 1866. It does not appear from the opinion itself, just what the facts were in regard to the calling of the convention, but in a later case, that of Quinlan v. Houston, & T. C. Ry. Co., 89 Tex. 376, 34 S. W. 738, the court stated the same as follows:

"From what has been quoted from the opinion in Stewart v. Crosby, supra, (15 Tex. 546) it appears that the ordinance then in question was submitted with the constitution, and voted upon by the people. The convention which passed the ordinance which was held valid in Grigsby v. Peak was called by virtue of the proclamation of President Johnson. *This proclamation did not require any part of the work of the convention to be submitted to the vote of the people, and, in our opinion, that convention, therefore, had the power to pass ordinances without submitting them for adoption to a popular vote.*"

To make application of this proposition before leaving this point, it is to be noted that in the case at bar the constitution as a whole was required to be submitted to the people, the ordinance irrevocable was not required to be submitted, the constitutional con-

vention was authorized by the act creating it, to pass this ordinance; not only was it authorized but it was required to do so, and the people deliberately elected it for the purpose of doing it, and in line with the authority just noted, the convention had the power to pass this ordinance without submitting it for adoption to popular vote. In the case of Quinlan v. Houston & T. C. Ry. Co. supra, the court had under consideration an ordinance passed by the convention of 1868, which provided for a levy of a tax upon the people of certain counties to aid in the construction of a railway. The
119 court held that the ordinance was not valid by reason of the fact that the convention which passed it was not authorized to definitely legislate, but was required to submit its acts to the people for their ratification. The convention in question was provided for by an act of Congress of March 2, 1867, (14 Stats. L. 428) and Act of March 23, 1867, (15 Stats. L. 2). Section 5 of the original act provided for the formation of a constitution which should be ratified by a majority of the persons voting on the question of ratification. No other authority was granted the convention except to form a constitution and submit it to the people. Sec. 4 of the act last referred to provided in hæc verba:

"Said convention, when organized, shall proceed to frame a constitution and civil government according to the provisions of this act, and the act to which it is supplementary; and when the same shall have been so framed, said constitution shall be submitted by the convention for ratification to the persons registered under the provisions of this act at an election to be conducted by the officers or persons appointed or to be appointed by the commanding general, as hereinbefore provided," etc.

The foregoing states the full authority of the convention and it will thus be seen as contradistinguished from the enabling act of 1906, that there was no authority whatsoever granted to this convention to pass ordinances or acts or constitutional provisions, valid in themselves without submission to the people, and any act, ordinance, or provision passed and not submitted, would, in accordance with practically all authority and all reasoning, be without force and without effect. In this case, the court discussing the questions, spoke as follows:

"We are of opinion, however, that the ordinance was not valid. The convention which met on June 1, 1868, was assembled in pursuance of an act of Congress passed March 23, 1867. It was called for the purpose of framing a constitution for the state, with a view to its restoration to the union. The constitution to be framed by it was to be submitted for ratification to a vote of the people. See Act Cong. March 2, 1867, Secs. 3, 4; 2 Pasch. Dig. p. 1093. The act of Congress did not invest the convention with the power of independent legislation. It is true that the question of the propriety of incorporating any specific provision into the fundamental law was for the sole determination of the convention. *But we are of opinion that, when a convention is called to frame a constitution, which is to be submitted to a popular vote for adoption, it cannot pass ordinances, and give them validity, without submitting them to the people for*

ratification as a part of the constitution. The delegates to such a convention are but agents of the people, and are restricted to the exercise of the powers conferred upon them by the law which authorizes their election and assemblage. The ordinance of the convention in question which divided the state into congressional districts, and that which provided for a submission of the proposed constitution to a vote of the people, are appended to the constitution as framed, and the whole is signed by the president and members as one instrument. 2 Pasch. Dig. pp. 1134, 1135. Sec. 1 of the latter ordinance contains the provision 'that the constitution adopted by this convention be submitted for ratification or rejection to the voters of this state,' etc. There is no provision for a submission of the independent ordinances. * * * The convention which passed the ordinance which was held valid in Grigsby v. Peak was called by virtue of the proclamation of President Johnson. This proclamation did not require any part of the work of the convention to be submitted to the vote of the people, and, in our opinion, that convention, therefore, had the power to pass ordinances without submitting them for adoption to a popular vote. The ordinance now under consideration was not submitted to a vote, though two others which were added to, incorporated into, and signed as a part of the constitution were so submitted. Since the convention could not finally legislate, and since a vote of the people was necessary to make its action effective, we conclude that the ordinance in question was invalid, and not effective for any purpose."

The distinction which we seek to here make is drawn fully in the preceding discussion. It will be noted that therein the court says that it was of the opinion that "when a convention is called to frame a constitution which is to be submitted to a popular vote for adoption, it cannot pass ordinances, and give them validity, without submitting them to the people for ratification as a part of the constitution." And in reference to the ordinance which was held valid in Grigsby v. Peak, it is to be noted that the convention which passed the same was called by virtue of the proclamation of President Johnson. That this proclamation did not require any part of the work of the convention to be submitted to the people for ratification, and that therefore the convention had the power to pass the ordinances in question without submitting them for adoption to a popular vote.

The case of Plowman v. Thornton, 52 Ala. 559, involved a consideration of the constitutionality or rather validity of an ordinance passed by the constitutional convention of that state in 1867. The powers of the convention which was called under the reconstruction acts of Congress was special and limited and it is conceded that it had no legislative power. An ordinance was adopted by the convention which was in accord with the warrant of its authority putting in operation the governmental agencies which it established. This ordinance was not submitted with the constitution to the people and the claim was that it was invalid because not being inserted in the body of the constitution.

Discussing this question the supreme court of that state, Chief Justice Brickell speaking, said:

"If it had been inserted in the body of the constitution, its validity would not have been questioned. It is temporary in its character and operation, and seems to us more properly the subject of an ordinance than of incorporation in the body of the constitution, in which only permanent and enduring provisions should be found."

The case of Washington v. Washington, 69 Ala. 281, is one of the extreme cases on the subject, and has probably been departed from but as it goes farther than is here contended for, it is noted. There was before the court for consideration the validity of an ordinance passed by the constitutional convention, not submitted to the people, and not having been embraced within the call of the convention, and yet Mr. Chief Justice Brickell speaking for the court said that "there is no room to doubt the power of the convention to enact it and it belongs to a class of legislation which, when employed for such beneficient purposes, deserves the highest judicial consideration." In a still later case, Ex Parte Birmingham & Atl. Ry. Co., 145 Ala. 514, the supreme court recognized the rule for which we contend in this opinion. The constitutional convention of Alabama which assembled by virtue of an act of the legislature, enacted an ordinance providing for court houses in certain counties. This act provided that the instrument to be promulgated by the convention should be submitted to the electors for ratification or rejection, with no power of definite legislation. The ordinance mentioned was not submitted and voted upon by the people, and hence was held void. This for the plain reason that the law under which the convention was organized did not authorize its passage and adoption by the convention. The court in the consideration of this question said:

122 "The act formulating a call of the convention, and which was voted on by the people, provided only for 'amending and revising' the constitution, and section 22 also required that the instrument framed should be submitted to the people for ratification or rejection. The people, therefore, in voting for the holding of a convention not only limited the powers of the convention to the amendment and revision of the constitution of 1875, but required that its action be submitted back to them. The convention, realizing the requirements placed thereon by the powers calling it into existence, provided by paragraph 4 of section 287 that the constitution be submitted to the electors of the state for ratification or rejection, but no provision was made for a submission of the ordinance in question. * * * The convention, therefore, had no right to exercise the authority of the legislature and adopt the ordinance in question, which was local legislation, pure and simple; and, the adoption of said ordinance being unauthorized, it could not become binding unless ratified by the people."

The Supreme Judicial Court of Massachusetts, speaking as to the authority of the constitutional convention in an opinion to the House of Representatives, 6 Cush. 573, held:

"If the legislature should submit to the people the expediency of

calling a convention of delegates, for the purpose of revising or altering the constitution of the commonwealth, in any specified part thereof, and the people should, by the terms of their vote, decide to call a convention of delegates, to consider the expediency of so altering the constitution, the delegates would derive their whole authority and commission from such vote, and would have no right, under the same, to act upon and propose amendments in other parts of the constitution not so specified."

The supreme court of Arkansas in the case of Bragg v. Tiffts, 49 Ark. 554, speaking to the same subject, said:

"Now a convention called, for instance, to frame a new constitution, has no inherent right to legislate about matters of detail. All of the powers that it possesses are such as have been delegated to it either by express grant or necessary implication."

Discussing the powers of the constitutional convention called on the authority of the legislature, the Court of Appeals of South Carolina in 1834, in the case of State ex rel. McDaniel v. M'Meekin, etc., 2 Hill, 1, 270, says:

"The question was made whether the convention which passed the ordinance was not limited by the purpose for which it was assembled; and I am of opinion that it was so limited. And this detracts in no degree from the sovereign character of its act when within that purpose. We have no authority to judge of, revise or control any act of the people; but when any thing is presented to us as the act of the people, we must of necessity judge and determine whether it be indeed their act. The sole difficulty seems to me to have arisen from confounding together the authority attributed by the constitution to the people, with that of the convention. *Certainly the convention was not the people for any other purpose than that for which the people elected and delegated them.*"

If a convention can be authorized to enact a constitution in its entirety and proclaim it as the organic law of a state without a submission of the same to the people, there is no argument or authority with which we are acquainted which would deny to it the power if within its written commission, to definitely enact less than a constitution. If a state convention may be empowered and can constitutionally enact the whole body for fundamental law of a state and proclaim finally their work as its constitution, (a thing which nobody denies can be done) where is the reason, logic or authority supporting the proposition that a constitutional convention so empowered could not pass and definitively enact less than the entire body of fundamental state law? If a body may do all, why may it not do a part in order to do all? Could the Oklahoma convention have met, organized and framed any constitution which could have been lawfully submitted to the people of the state or which would have been subject to and competent to be approved by the president except it first carried out the mandate of the law of its creation and passed as it did, the ordinance here in question? As the life of the state organized under it and the constitution itself depended upon the enactment of this ordinance, how can it be said to be of less weight than the constitution itself? Suppose that the enabling act

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had provided for a constitution enacted and proclaimed by the convention and had at the same time provided for submission to the people of the state the question of whether intoxicating liquors might be sold within its borders; will any one assert that the convention could have definitively passed upon the latter subject? And if the enabling act as suggested had provided for the definitive enactment of a constitution but required the submission of the liquor question to the people of the state, will any say that the constitution would not likewise have been valid and superior to any legislative act? I think not. If consent is yielded to the postulates here presented, can any sound reason, authority, or argument be presented why an enabling act could not have empowered the convention to do just what
124 was done in this case, the constitution being submitted to a vote of the people, and the ordinance irrevocable definitively enacted by the convention? And this being done by a convention called for the purpose of enacting constitutional provisions and being done within the power of the call, and being done with the intent on the part of congress, on the part of the people, and on the part of the convention, that it should be irrevocable, that indeed it should be higher than the provisions of the constitution, itself, is there to be found within the domain of argument or authority, any reason why it should not be so declared? But, it is asserted that if it was intended to enjoy the exalted position of a constitutional provision, that it would have been placed within the body of the constitution. This very fact in my judgment demonstrates incontrovertibly that the same was not intended to be subject to the control of, or to be dealt*h* with by the legislature. There are parts of the constitution which it is specifically provided the legislature may after a certain date repeal or amend. There are other provisions which provide for the amendment of the constitution itself. All constitutions have provisions for their amendment and it was known necessarily that this constitution would likewise contain a provision for its amendment. The ordinance which we have before us was not intended by anybody to be amend*ment* or repealed during its intended life and hence it was designedly placed in a position where it would not fall within the purview of any provisions or enactment providing for repeal or amendment. It has been supposed by some that the case of Duke v. Cahawba Navigation Co., 10 Ala. 82, was in its declarations, against the doctrine here asserted. We do not so read the discussion of the propositions involved. By the constitution in that state the powers of the state government were restricted in particular matters covered by it, and the ordinance referred to was a declaration by the people that certain general powers otherwise appertaining to the state as a sovereignty should not be exercised in par-
125 ticular cases. It provided also that the disclaimer in particular cases which in the case then before the court, involved control over a navigable river, should be irrevocable *"without the consent of the United States."* The United States granted consent to its revocation and then the state legislature assuming authority to act upon it, enacted the law which was before the court. The question there presented was altogether different from the one here

presented. That convention was organizing a state government and was vesting just such powers as it desired it to exercise and was restricting it in others that it did not intend it should exercise. In the case then before the court the state government which was being inaugurated, was denied the right, *"except with the consent of the United States,"* to deal with that subject. When the United States gave it- consent therefor, the legislature then had authority to deal with it and the court so held. In the discussion of this proposition the court, speaking through Mr. Justice Goldthwaite, said:

"We think the argument that the ordinance appended to our constitution is a part of that instrument, and can only be abrogated and annulled in the same manner as any other part, cannot be sustained. By the constitution, the powers of the state government are restricted in the particular matters covered by it, and the ordinance is the declaration by the people, that certain general powers, otherwise appertaining to the state as a sovereignty shall not be exercised in particular cases. It provides also, that the disclaimer shall be irrevocable without the consent of the United States. The state government being invested with the entire authority of the people, *except where they have chosen to restrict the government*, it follows that all the external relations of the people with the citizens of other states or with the government of the United States, must be conducted by the state government. The ordinance itself indicates that it is revocable with the consent of the United States and as the consent of the people of this state can only be expressed through the state government, it follows that when the assent of both is given by the constituted authorities of each, the powers disclaimed may be resumed and immediately exercised by the state authorities, under the general powers, *these not being restricted otherwise than by the ordinance*. As the ordinance is thus revocable by the consent of the United States, it does not seem to admit of material doubt that a consent to a partial abrogation is effectual as a revocation pro tanto."

Moreover, the Alabama ordinance was over a subject-matter with which the United States doubtless had plenary authority without an ordinance, and the extent which the people sought to bind themselves was to the point of consent of Congress, and when this was attained, they were no longer bound, for they did not reserve the right to deal with it themselves under an election to be called by the Legislature. It is insisted that the case of France v. Autry,
126 18 Okla. 561, is authority for the conclusion *to* which the majority of our associates have reached. Neither can we so read this, for the reason that the ordinance with which the court in that case was de*la*ing was the temporary election ordinance and not the irrevocable state capital ordinance, and instead of the authority of that case weighing against the position which we have taken, it in fact supports it by showing that those ordinances which are intended to be temporary will be so considered, which marks the distinction between those which are intended and designed to be permanent. The election ordinance for the submission of the constitution whether passed by a legislature or by the convention itself, under its authority necessarily passed on being exercised. From its

very nature, it could not be used again because it would deal with conditions entirely in the past after the people had once acted under it. So, France v. Autry is not contrary to the doctrine here advocated.

But it is supposed that Sec. 7 of Art. 5 of the constitution, a section found among the initiative and referendum provisions of that document, vests the legislature with the authority which is here sought to be sustained. The section reads as follows:

"The reservation of the powers of the initiative and referendum in this article shall not deprive the legislature of the right to repeal any law, propose to pass any measure, which may be consistent with the constitution of the state and the constitution of the United States."

To those familiar with the history of the convention, it is unnecessary to say that this right to repeal any law, propose or pass any measure vested in the legislature, was placed therein, with no thought whatsoever that it bore the remotest relation to the irrevocable ordinance which the convention has just enacted, but it was in response to a demand that the government organized within Oklahoma, should not be amenable to the charge that it was democratic and not republican in form. The purpose of the section is plainly disclosed by its terms. It simply states in other words that the powers of the initiative and referendum when exercised by the people shall not deny to the legislature the authority to deal with the measures
127 so passed. Thus, vesting in the legislature authority equal to that reserved by the people under the initiative and referendum provisions. The people by the referendum being able to destroy any law passed by the legislature and by the initiative, — enabled to pass any act to which the legislature denied its assent. The power at all times, however, remaining and abiding with the legislature to repeal, modify, or amend any such provisions. We submit that this is the extent of the scope of the intent of that section. But, if this section carried with it all that is claimed for it, and if it was here intended to grant a general authority to the legislature to repeal any law, propose or pass any measure not inconsistent with the constitution of the United States or the constitution of the state of Oklahoma, even then it would not be sufficiently far-reaching under the common canons to authorize it to repeal the irrevocable ordinance here involved. The law on this matter uniformly recognized by the courts of the nation, is laid down in Vol. 2, Sec. 346, of Lewis' Sutherland Statutory Construction, and reads as follows:

"Where there is an act or provision which is general, and applicable actually or potentially to a multitude of subjects, and there is also another act or provision which is particular and applicable to one of these subjects, and inconsistent with the general act, they are not necessarily so inconsistent that both cannot stand, though contained in the same act, or though the general law were an independent enactment. The general act would operate according to its terms on all the subjects embraced therein, *except the particular one which is the subject of the special act.*"

Speaking of implied and recognized exceptions to acts containing

general provisions, this court in the case of Huston v. Scott, 20 Okla. 142, 153, said:

"The foregoing rules constitute well-understood limitations to the effect of any general law. They are just as much a part of the act as if written into it. They control it and restricts the scope of its action to the utmost limit. No legislature acts except within the scope they grant, and no court construes the meaning of any statute presented for consideration, except it recognizes their force and potency. If the plaintiff in error's contention were consistent, and this section permitted to stand alone, repealing and taking the place of all other laws touching the subject, and its words are to be given the amplified meaning for which he contends, let us see into what mazes and difficulties we would be led: 'All male persons of the age of 21 years, etc., may take title to, hold, mortgage, convey, and make any contract relating to real estate or any interest therein.' No exceptions are mentioned within the section, and he contends there are none, and that this supplants all the law on the subject. Sec. 3612, St. Okla. 1893, provides: 'After his incapacity has been judi-
128 cially determined, a person of unsound mind can make no conveyance or other contract, nor designate any power, nor waive any right, until his restoration to capacity is judicially determined.' To give the force contended for by plaintiff in error to the section in question would qualify every incompetent 21 years old in the state, even if his incapacity had been judicially determined, and he was under the care of a guardian; even though a gibbering imbecile, incarcerated in a sanitarium, occupying the ward of the incurable, he would be fully competent, under this construction, to convey his real estate, mortgage it, and deal with it, and the courts supine and powerless would witness his exploitation. In addition to that, section 2578, St. Okla. 1893, provides: 'A person sentenced to imprisonment in the territorial prison for life is thereby deemed civilly dead.' The courts hold, under this section, a man in this condition is disqualified from making any deed, mortgage, or other conveyance of his property. Does any one suppose that this section and the preceding one were in the minds of the legislature at the time they passed the conveyancing act in question? And the person upon whom these sections operate, if they be but 21 years of age, permitted to deal to the fullest extent, in their real property? Are they within the scope, purpose, and purview of the act? * * * The foregoing exemplifies the absurd results following a literal construction of the statute as contended for by plaintiff in error and we escape therefrom only by virtue of the salutary rules herein invoked. The mere statement of the proposition carries refutation with it."

The special act in this case was the ordinance irrevocable de*l*ing specifically and definitely with the location of the state capital, and the general law therefor vesting in the legislature the power here claimed for it, would not under this rule authorize it to repeal the special, irrevocable ordinance. The supreme court of Missouri in the case of Edwards v. Lesueur, 132 Mo. 410, which involved an alleged irrevocable agreement, in a case wherein it was claimed that the constitutional convention had provided for its repeal, said:

"The convention would hardly have made an irrevocable agreement and immediately proceeded to violate it."

We are willing to assert for our own constitutional convention a claim equally as high, nay more,—we are unwilling to yield the proposition that the men constituting the convention who framed and submitted the constitution under which we live ever intended after they had adopted the ordinance irrevocable, to vest the legislature with the authority to repeal it. Such a conclusion is to our mind impossible. Nor do we believe nor will we consent that the people of the state when they adopted the constitution, ever intended that the pledge which was made and the fundamental law which they passed in the irrevocable ordinance, should or could be violated by any legislature. But we believe, and we love to think that when the convention and the people enacted this ordinance, that they did so with the honest intent that it should be carried out in good faith and if it was so enacted, then our legislature manifestly lacked the authority to repeal it. Because the act was not valid as an irrevocable ordinance as to the people, the majority of the court have fallen into the error in reference to the real substance of the act, to-wit, in holding that the location of the capital which was reserved by the people to be voted on by themselves at an election to be called by the legislature must also fall. It is held that because, forsooth, the people declared that no one shall act on this prior to 1913,—and this cannot stand,—then anyone, or at least the legislature may act on it prior to that date; that the legislature which could act duly by calling an election after 1913, could, because the 1913 provision falls, act with plenary power prior to that date and locate the capital, the right to do which the people sought to irrevocably reserve to themselves. Let us reform the ordinance as it reads under the view in which we seek to present it, stripped as it is by the court of the irrevocable and the compact elements. It would then read: Be it ordained by the constitutional convention for the proposed state of Oklahoma, that said constitutional convention do by this ordinance, irrevocable by the legislature, accept the terms of the enabling act, providing that the capital of said state shall be in the city of Guthrie in the present territory of Oklahoma, and shall not be changed therefrom except it may be located by the electors of said state at an election to be provided for by the legislature after 1913. Did not the people say—and lawfully say—and with full power to say—just that? Prior to 1913 the irrevocable feature falling, the people could locate it—how, it is not necessary to inquire—but they have bound the hands of the legislature in reference thereto by specifically setting out its powers. And the expression of this definite authority certainly excludes the exercise of any other. As was said by the supreme court of Rhode Island in an Opinion to the legislature, 14 R. I. 651:

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"We are of opinion that the mode provided in the constitution for the amendment thereof is the only mode in which it can be constitutionally amended. The ordinary rule is that where power is given to do a thing in a particular way, there the affirmative words, marking out the particular way, prohibit all other ways by

implication, so that the particular way is the only way in which the power can be legally executed. The rule was recently recognized by the supreme court of the United States in Smith v. Stevens, 10 Wall. 321. There by act of Congress, lands were ceded to Indians with power to sell them, or parts of them, in a particular manner, and the court held that a sale in any other manner was void. The rule was likewise recently recognized by the English Court of Exchequer in a case in which it was thus expressed: 'If authority is given expressly, though by affirmative words, upon a defined condition, the expression of that condition excludes the doing of the act authorized under other circumstances than those so defined: "Expressio unius est exclusio alterius."' North Stafford Steel &c. Co. v. Ward, L. R. 3 Exch. 172, 177. Cases to the same point might be indefinitely multiplied. 1 Kent Com. 467, note *d;* 1 Sugden on Powers, 258 et sq.; City of New Haven v. Whitney, 36 Conn. 373; District Township of the City of Dubuque v. The City of Dubuque, 7 Iowa 262, * * * Our constitution is, by its own express declaration, the supreme law of the state; any law inconsistent with it is void, and, therefore, if the provision which it contains for its own amendment is exclusive, implying a prohibition of amendments, in any other manner, then, of course, any act of the assembly providing for a convention to amend the constitution is unconstitutional and void."

We have pressed upon our associates the foregoing arguments with all the vigor which we possess. That they were logical and expressed the law on the subject involved, appeared to us to be irrefutable, but, we have been unable to secure the assent of a majority thereto.

At the conclusion of the debates of the Federal constitutional convention, as the body was about to sign the document and disperse, Benjamin Franklin, then silvered and palsied with age, probably one of the wisest men our nation has ever produced, stood in his place and asserting that he did not entirely approve the constitution, said:

"I am not sure I shall never approve it; for, having lived long, I have experienced many instances of being obliged by better information or fuller consideration, to change my opinions even on important subjects, which I once thought right, but found to be otherwise."

An exalted regard for the opinion of my associates who do not agree with me herein has caused some little trepidation on my part over the submission in writing the conclusions to which I have here come. But, if what I have said on this great and important historical
ossacion has not met the sanction of a majority of the court,
131 it will at least have the merit of preserving though in a crude and hastily prepared form, my own and the views of my brother Kane, along with those eminent counsel who have assiduously and in good faith diligently labored to aid this court in arriving at a just and legal conclusion.

In this opinion I am also authorized to say Mr. Justice Kane concurs.

132 (Filed February 9, 1911.)

No. 2225.

W. H. COYLE, Plaintiff,
v.
THOS. P. SMITH et al., Defendants.

Dissenting Opinion by Kane, J.

In the case of Thos. P. Smith, Secretary of State, et al., plaintiffs in error, v. C. N. Haskell, et al., defendants in error, recently decided by this court, I based my concurrence in the conclusion reached by the court upon the ground that upon the acceptance of the terms and conditions of the enabling act by the constitutional convention by ordinance irrevocable, that part thereof which provides that, "The Capital of said State shall temporarily be at the city of Guthrie, in the present Territory of Oklahoma, and shall not be changed therefrom previous to anno Domini nineteen hundred and thirteen, but said Capital shall after said year be located by the electors of said State at an election to be provided for by the Legislature: Provided, however, That the Legislature of said State, except as shall be necessary for the convenient transaction of the public business of said State at said Capital, shall not appropriate any public moneys of the State for the erection of buildings for Capitol purposes during such period," was entitled to the force and effect of a compact between the United States and the people of the proposed state which can only be rescinded by the common assent of those who are parties thereto. In the present case I dissent from the opinion of the majority of the court upon the same ground. I have such a high regard for the opinion of my brothers that it is with hesitation I differ from their judgment, and I doubt that I would have temority to do so if it did not appear perfectly clear to me that their opinion in the instant case runs counter to a principle of
133 law which has been sanctioned by the legislative departments of the state and federal governments of this republic ever since its creation, and upheld with practical unanimity by the courts, state and federal, in the comparatively few cases wherein it has been questioned.

Without reviewing the powers of a constitutional convention to bind the people of a proposed state by accepting the terms of its enabling act, we find the power of the convention whose act is now under consideration very fully, and I think correctly, defined in Frantz, et al. v. Autry, 18 Okla. 561, wherein it is said:

"The delegates to the convention were not the agents or representatives of Congress, but they were the immediate agents and representatives of the people of the two territories. They derived their power and authority from the people in their sovereign capacity."

Speaking of the power of the convention, Mr. Justice Hainer, who delivered the opinion of the court, continues:

119, being necessary for the Congress to concur in order for
136 the jurisdiction to attach to the state courts. And unquestionably where a state had formed a constitution and provided therein that the state courts should become the successors of like courts under the territorial form of government, and that as to criminal cases, not of a federal nature, the same should be prosecuted to final judgment in such court; that when Congress admitted such a state into the Union with such a provision in its constitution it expressly concurred in and agreed to such provision. In the case- of West Virginia, Nevada, Colorado, North and South Dakota, Montana, Washington, Utah and Oklahoma, where the constitutions were formed under an enabling act, and by virtue of that enabling act a proclamation was issued by the President of the United States admitting such state or states into the Union under the constitution thus formed containing like provisions in like manner, did not the federal government concur in such provisions in like manner as if such states had been admitted directly by act of Congress? Should it be urged by counsel that the President had no such constitutional authority, he would be contending for a proposition that would be tantamount to declaring that Oklahoma was not legally in the Union of States. This court certainly will not make such a declaration—will not repudiate the power that brought it into active existence."

The case of Higgins v. Brown, supra, was followed in Ex Parte Curlee, 20 Okla. 192; Ex parte Bailey, 20 Okla. 497; Ex parte Brown, 20 Okla. 505; Ex parte Buchanan, 20 Okla. 831. In Ex parte Bailey, supra, after citing section 4 of the enabling act, which provides,

"And if the constitution and government of said proposed state republican in form, and if the provisions of this act have been complied with in the formation thereof, it shall be the duty of the President of the United States, within twenty days from the receipt of the certificate of the results of said election and the statement of the votes cast thereon and a copy of said constitution, articles, propositions and ordinances, to issue his proclamation announcing the result of said election; and thereupon the proposed state of Oklahoma shall be deemed admitted by Congress into the Union, under and by virtue of this act, on an equal footing with the original states."

Mr. Chief Justice Williams continues:

"The only limitation is that the constitution and state government shall be 'republican in form' and comply with the provisions of said act. All other provisions which the constitutional convention had the power to insert by reasonable implication permitted and concurred in, the act of, the President consummating the same."

It seems to be well settled that whether a proposed state shall be admitted and whether its government is republican in form are political questions which must be settled by Congress and the people of the proposed state, because Congress alone is vested with the power to admit new states and charged with the duty to guarantee a republican form of government, whilst the people have the power

condition precedent to admission as a state. The enabling act of the state of Ohio was adopted by Ordinance irrevocable the same as certain conditions named in the enabling act were adopted by the people of Oklahoma, and it was suggested in that case, as in this, that it being no part of the constitution, the people of the state might change it, and in response, to this, the court said:

135 "This portion of the ordinance of 1787 is as much obligatory upon the State as our own constitution, In truth, it is more; for the constitution may be altered by the people of the state, while this cannot be altered without the assent both of the people of this state and of the United States through their representatives. It is an article of compact, and until we assume the principle that the sovereign power of the state is not bound by compact, this clause must be considered obligatory."

In Higgins v. Brown, Judge, et al., 20 Okla. 355, and several other cases, this court recognizes the soundness of the rule laid down in the Autry case, and further holds that at least one of the subjects embraced within the enabling act was a proper subject of compact and that its acceptance by the convention transferred legislative power to the state which, in the absence of such compact, belonged to the United States. The question in Higgins v. Brown, supra, was whether or not Congress with the concurrence of the state could provide that the state courts as successors of the territorial courts, could proceed to final determination or render final judgment in criminal cases not of a federal character, pending and not finally disposed of in the district courts of the territory of Oklahoma or in the United States courts of the Indian Territory, It was held that,

"Sections 16 and 20, inclusive, of the enabling act for Oklahoma, Act June 16, 1906, v. 3335, 34 Stat. 276, 277, as amended March 4, 1907, c. 2911, 34 Stat. 1286, 1287, when concurred in by the state of Oklahoma by the adoption of sections 27 and 28 of the schedule to the constitution, being a proper exercise of power by the Congress under article 4, sec. 3, of the constitution of the United States, are valid."

Mr. Chief Justice Williams, who delivered the opinion of the court after an exhaustive review of the enabling acts of the several states admitted to statehood prior to Oklahoma and the decisions bearing upon the question then under discussion, said:

"In the cases of West Virginia, Nevada, Nebraska, Colorado, North and South Dakota, Montana and Washington, Utah and Oklahoma, these states have been admitted by proclamation of the President of the United States, pursuant to the provisions of the enabling acts, and Wyoming and Idaho were admitted after they had formed Constitutions, not under an enabling act, but by act of Congress. We find that in all the states that were admitted by an act of Congress, and not by proclamation of the President, the state courts, with provisions in their schedule- of their constitutions permitting such jurisdiction, have exercised the same in cases like the one at bar, and why should the state courts of Oklahoma likewise not exercise like jurisdiction? It undoubtedly is in accordance with the rule laid down in Bonner v. Porter, 9 How. (U. S.) 235, 13 L. Ed.

"The convention has and can exercise plenary powers subject to the limitations: (1) That the constitution shall be republican in form: (2) That it shall not be repugnant to the constitution of the United States and the principles of the Declaration of Independence: (3) That no distinction shall be made on account of race or color: and (4) That the convention shall accept by ordinance irrevocable all the terms and conditions of the enabling act."

In discussing the power of Congress in that regard, the learned Justice says:

"It is true that Congress has the power to impose conditions upon a territory, as a condition precedent to entitle it to admission as a state."

The opinion in that case decides three questions preliminary to the questions herein involved: (1) The source of the power of the constitutional convention to act for the people: (2) That the convention had the power to accept the terms of the enabling act: and (3) That Congress had the power to impose conditions upon the people of the proposed state precedent to its admission. The questions which remain are: 1. Was the provision of the enabling act involved herein a proper subject for compact? 2. If it was not, is the action of the constitutional convention in relation thereto entitled to the force and effect of a fundamental law, or does it stand upon the footing of an ordinary statutory law repealable at
134 the will of the legislature? None of the members of the court take the position that it was a void and futile act: so as far as this case is concerned, it is entitled to the status of (1) A compact; (2) A fundamental law, or (3) An ordinary statutory law repealable at the will of the legislature.

It seems to me that there can be but one answer to the question, Is the provision of the enabling act in relation to the temporary location of the capital, a proper subject of compact between the United States and the people of the proposed state. That the constitutional convention had the power to bind the people of the state in that respect by fundamental law there can be no question. I cannot understand why it could not do the same by following the directions of the mandate that called it into existence. As far as the acceptance of this particular provision of the enabling act is concerned, the action of the constitutional convention is as fully ratified and affirmed by the people as if it had been written into the constitution. When the delegates were elected the people had full knowledge of the proposals contained in the enabling act and that as the price of statehood it would be necessary to accept some of them by ordinance irrevocable, whilst others must be incorporated in the constitution. Afterwards the action of the convention in that regard was again ratified by the people when they adopted the constitution with full knowledge of the action of the constitutional convention, and again by accepting statehood after the President issued his proclamation wherein it was reiterated that the terms of the enabling act had been fully complied with.

In the case of Hogg v. Zanesville Canal & Mfg. Co., 5 Ohio 410, the point was before the court as to the effect to be *to* an irrevocable

to accept or reject the proposals of Congress. Luther v. Borden et al., 7 Howard 1; Martin v. Mott 12 Wheaton 19; Wilkes v.
137 Dinsman, 7 Howard 89; Oklahoma City v. Shields, 22 Okla 265; In re Day, et al., 27 Fed. 678; Rubber Company v. Goodyear, 9 Wall. 788; The Japanese Immigrant Case, 189 U. S. 86; Looe Shee v. North, 170 Fed. 570; Gibbons v. Ogden, 9 Wheaton 1; Martin v. Hunter, 1 Wheaton 304; Prigg v. Commonwealth of Pennsylvania, 16 Peters 539; State v. Harris, (S. C.) 2 Bailey, 598.

The case of Bonner, et al. v. Porter, cited by the learned Chief Justice in the Higgins case, supra, arose out of the failure of Congress to make proper provision for the transfer of cases pending in the territory of Florida upon its admission into the Union as a state; Upon this question, Mr. Justice Nelson, who delivered the opinion for the court, said:

"On the admission of a territorial government into the Union as a state, the concurrence of both the federal and state governments would seem to be required in the transfer of the records, in cases of appropriate state jurisdiction, from the old to the new government. An act of Congress would be incapable of passing them under the state jurisdiction, as would be an act of the legislature of the state to take the records out of the custody of the federal government. Both should concur. The like concurrent legislation would also seem to be required in respect to cases pending in this court for review on writs of error or appeal from the territorial courts, which appropriately belonged to state jurisdiction, to enable us to send down the mandate to the proper state tribunal for any further proceedings that might be necessary in the case."

Speaking of the duty of Congress in this regard, Mr. Justice Nelson, continues:

"It is to be regretted that proper provision had not always been made by Congress, upon a change of government, in respect to the pending business in the territorial tribunals, so as to remove all embarassment and perplexity on the subject. * * * A very slight attention to the subject by Congress, at the time, would remove all the difficulties that have occurred in several of the states recently admitted."

Under its power to admit new states into the Union and its duty to guarantee to every state a republican form of government, Congress, for more than a century has exercised the power of framing enabling acts providing for the erection of new states, containing propositions which the people were required to accept as condition precedent to admission. It has been held that contemporary interpretations of the constitutions practiced and acquiesced in for years, fixes its construction, (Stuart v. Laird, 1 Cranch, 299; Martin
138 v. Hunter, 1 Wheaton 304; Bridge Co. v. Dix, 6 Howard, 507), and this rule was given proper weight in Higgins v. Brown, supra. There is room for the application of the rule in the case at bar. Most of these propositions, if not all of them, consists of grants of legislative authority to the federal government or waivers of the exercise of some function of government by the state, usually for a limited time. These concessions or waivers have been

treated by the courts as compacts and not as involuntary exactions forced upon the people by the federal government, White v. Hart, 15 Wallace, 646, illustrates this proposition. In that case it was held that,

"The constitution adopted by Georgia, A. D., 1868, by which it was provided that, 'no court or officer shall have, nor shall the General Assembly give, jurisdiction to try, or give judgment on, or enforce any debt, the consideration of which was a slave, or the hire thereof,' is to be regarded by the court as voluntarily adopted by the state named, and not as adopted under any dictation and coercion of Congress. Congress having received and recognized the said constitution as the voluntary and valid offering of the state of Georgia, this court is concluded by such action of the political department of the government."

These compacts between the sovereign people and the federal government have embraced a wide range of subjects, but they all have this essential quality in common—the subjects treated would have been rightful subjects of legislation by the state or government that relinquished them, if the compact had not been entered into. Some of the most common subjects embraced within such compacts are, agreements not to require any religious tests as a qualification for holding office; that no plural marriage shall be permitted; that the land of nonresidents shall not be taxed at a higher rate than the lands belonging to residents; not to claim any interest in the public or waste lands belonging to the United States; that judicial proceedings shall be carried on in the English language; that navigable waters shall be free to all persons, etc., etc.

Besides the foregoing class of compacts between the federal government and the people of a proposed state, compacts between states concerning governmental affairs have been very common. The history of the earliest attempts of the states to form a union discloses that each claimed and exercised the right to make its own compacts surrendering as much or little of its sovereignty
139 to the federal government as in its judgment seemed proper and this right has been uniformly upheld by the courts. In Ft. Leavenworth R. Co. v. Lowe, 114 U. S. 525, 5 Sup. Ct. Rep. 995, wherein a compact between Kansas and the United States concerning a military reservation was upheld, Mr. Justice Field, in speaking of the relation of the state to the Federal government, said:

"In their relation to the general government, the states of the Union stand in a very different position from that which they hold to foreign governments. Though the jurisdiction and authority of the general government are essentially different from those of the state, they are not those of a different country, and the two, the state and general government, may deal with each other in any way they may deem best to carry out the purposes of the constitution. It is for the protection and interests of the states, their people and property, as well as for the protection and interests of the people generally of the United States, that forts, arsenals, and other buildings for public uses are constructed within the states. As instrumentalities for the execution of the powers of the general govern-

ment, they are, as already said, exempt from such control of the United States as would defeat or impair their use for those purposes; and if, to their more effective use, a cession of legislative authority and political jurisdiction by the state, would be desirable, we do not perceive any objection to its grant by the legislature of the state. Such cession is really as much for the benefit of the state as it is for the benefit of the United States. It is necessarily temporary, to be exercised only so long as the places continue to be used for the public purposes for which the property was acquired or reserved from sale. When they cease to be thus used, the jurisdiction revorts to the state."

And in dealing with each other it does not appear to have made any difference whether the question involved pertains to a political or property right. Most of these compacts deal with the political features of the subjects embraced within their purview and consists of limitations upon the power to legislate upon the subjects mentioned, no property rights existing between the contracting sovereignties being directly involved. The question of property rights usually arose by some citizen or taxpayer contending that his rights in that respect would be affected by the enforcement or violation of the compact as the case might be, and in that particular this case is similar to the rest.

Spooner v. McConnell, 22 Fed. Cases, p. 939, contains an interesting discussion of the general question now under consideration, and Mr. Justice McLean, who delivered the opinion, satisfactorily answers the contention, that to give to the provision of the
140 enabling act under discussion and its acceptance the force and effect of a compact would be restrictive of the sovereign power of the state, as follows:

"It is a well established principle, that no political change in a government, annuls a compact made with another sovereign power or with individuals. The compact is protected by that sacred regard for plighted faith, which should be cherished alike by individuals and organized communities. A disregard of this great principle would subject all the lights and advantages of civilization, and throw us back on the age of vandalism. This compact was formed between political communities and the future inhabitants of a rising territory, and the states which should be formed within it. And all who became inhabitants of the territory made themselves parties to the compact. And this compact so formed could only be resconded, by the common assent of those who were parties to it. When application was made to congress by the people of the eastern part of the territory, to authorize the call of convention to form a constitution, modifications of certain provisions of the compact were proposed, some of which were embodied in the constitution subsequently formed, and others of them, after various alterations, were also inserted. But that provision of the compact which declared that the navigable waters falling into the St. Lawrence and the Mississippi, and the carrying places between them shall be common highways and forever free, etc., was not proposed to be modified. * * * The state has been admitted into the Union on an equal footing

with the original states. And yet the state is bound by compact not to tax the lands of the United States, nor until the expiration of five years after they shall have been sold. The power to tax is an incident to sovereignty. Does this exemption take away or lessen this power. If it does, in the sense contended, then the State of Ohio was not admitted into the Union, with the same powers of sovereignty as the original states. This consequence is not obviated by the fact that this was restriction imposed, with the consent of the state, for an equivalent. If it be an abridg-ment of the sovereign power of the state, the objection stands in its full force. The compact not to tax was the voluntary act of the people of the state, but not more so than was the compact by the same people that the navigable waters should be common highways. And this exemption from taxation is as much a restriction on the exercise of the sovereign power, as the exemption of the navigable streams from obstruction by the same power. * * *

The terms, 'sovereign power of a state,' are often used, without any very definite idea of their meaning and they are often misapplied. Prior to the formation of the federal constitution, the states were sovereign in the absolute sense of the term. They had established a certain agency, under the Article of Confederation, but this agency had little or no power beyond that of recommending to the states, the adoption of certain measures. It could not be properly denominated a government, as it did possess the power of carrying its acts into effect. The people of the states by the adoption of the federal constitution, imposed certain limitations in the exercise of their powers which appertain to sovereignty. But the states are still sovereign. They are bound by the compact not to exercise certain powers which they have delegated to the federal government, and the citizens of the state are bound to respect and obey the powers thus delegated. But this compact, or federal constitution, was voluntarily formed by the people of the states, in their sovereign capacity, and may be changed at their pleasure in the mode provided.

The sovereignty of a state does not reside in the persons who fill the different departments of its government; but in the people from whom the government emanated, and who may change it at their discretion. Sovereignty, then, in this country, abides with the constituency and not with the agent. And this remark is true, both in reference to the federal and state governments. If the people of a state, in their sovereign capacity, enter into a compact, either
141 from motives of sound policy or for a valuable consideration paid, that certain lands within the state shall be exempt from taxation, or that certain navigable rivers shall remain unobstructed, the sovereignty of the state is no more affected, than it is by every act of incorporation, where exclusive privileges are given to a company or an individual. Certain objects on which the sovereign power may act are, by its own consent, withdrawn from its action; but this does not divest the state of any attribute of its sovereignty. If certain lands be exempt from taxation, the general power to tax is not affected; and so as to any exclusive right or privilege which is vested by compact or act of incorporation. A state cannot divest itself of its essential attributes of sovereignty. It cannot enter into a compact not

to exercise its legislative and judicial functions, or its elective rights; because this would be to change the form of government which is guaranteed by the federal constitution. But it is earnestly contended that the rights asserted by the complainant, are wholly incompatible with the sovereignty of the state, and with the provision that the state was admitted on an equal footing with the original states. Does this provision mean, that the new state shall exercise the same powers and in the same modes, as are exercised by any other state? Now this cannot be the true construction of the provision, for there cannot be found, perhaps, any two states in the Union whose legislative, judicial and executive powers are in every respect alike. If the argument be sound, that there is no equal footing short of exact equality in this respect, then the states are not equal. But if the meaning be, that the people of the new state, exercising the sovereign powers which belong to the people of any other state, shall be admitted into the Union, subject to such provisions in their fundamental law as they shall have sanctioned; within the restrictions of the federal constitution, then the states are equal. Equal in rank, equal in their powers of sovereignty; and only differ in their restrictions, which, in the exercise of those powers, they may have voluntarily imposed upon themselves. Thus a state may, in her constitution, prohibit the legislature from incorporating banks, or in fact from passing any act of incorporation; and yet this state would be admitted into the Union on an equal footing with the other states. The same powers were exercised in forming a constitution, but in the distribution of the powers of the state government they were not given to the same extent, nor were they to be exercised in the same manner. But this produces no inequality. The states are equal, inasmuch as each has, by its own voluntary will established its own government, and has the power to alter it. This is the principle on which the state governments are established, and consequently they all stand upon an equal footing. They have the same basis; have been formed according to the will of the people, and may be changed at their discretion. If then, there is nothing in the constitution of the state which is repugnant to the compact in the ordinance in relation to navigable waters, and the parties to the compact have in no form annul-ed it, and it is not inconsistent with that equality which the state of Ohio claims with the original states, it follows that this compact is in full force, and is a subject of judicial cognizance."

In Green v. Biddle, 8 Wheat. 1, an occupying claimants' act passed by the legislature of the state of Kentucky was held to be invalid upon the ground that it was in violation of the compact between the states of Virginia and Kentucky contained in the act of the legislature of Virginia of December 18, 1789, and ratified by the convention which framed the constitution of Kentucky and included in the constitution of that state as one of its fundamental articles.

Both parties to the suit claimed title to the land in contro-
142 versy under patents from the state of Virginia prior to the erection of the district of Kentucky into a state. The compact was to the effect that all private rights and interests in the land

within said district of Kentucky derived from the law of Virginia prior to such separation shall remain inviolate and secure under the laws of the proposed state, and shall be determined by the laws now existing in this state (Virginia). The occupying claimants' act passed by the legislature of Kentucky materially changed the private rights and interests of the parties in the lands in controversy, as they existed under the laws of the state of Virginia, contrary to the terms of the compact. The case was twice before the court. On the first submission the opinion was prepared by Mr. Justice Story, and on rehearing by Mr. Justice Washington; present, Mr. Chief Justice Marshall, and Justices Johnson, Livingston, Todd, Duvall and Story. Both opinions uphold the compact. On the first hearing there was no appearance or brief on behalf of one of the parties, but on rehearing Henry Clay appeared as amicus curiæ. Mr. Clay contended that the limitations imposed by the compact upon the state of Kentucky were not of a character which said state was bound to respect for the reason that the state of Kentucky in its sovereign capacity could not be bound by the compact as it required it to surrender part of its sovereignty. Discussing this contention, Mr. Justice Washington, said:

"The next objection, which is to the validity of the particular clause of the compact involved in this controversy, rests upon a principle, the correctness of which remains to be proved. It is practically opposed by the theory of all limited governments, and especially of those which constitute this Union. The powers of legislation granted to the government of the United States, as well as to the several state governments, by their respective constitutions, are all limited. The article of the constitution of the United States, involved in this very case, is one, amongst many others, of the restrictions alluded to. If it be answered, that these limitations were imposed by the people in their sovereign character, it may be asked, was not the acceptance of the compact the act of the people of Kentucky in their sovereign character? If, then, the principle contended for be a sound one, we can only say, that it is one of a most alarming nature, but which, it is believed, cannot be seriously entertained by any American statesman or jurist.

Various objections were made to the literal construction of the compact, one only of which we deem it necessary particularly to notice. That was, that if it be so construed as to deny to the
143 legislature of Kentucky the right to pass the act in question, it will follow, that that state cannot pass laws to affect lands, the title to which was derived under Virginia, although the same should be wanted for public use. If such a consequence grows necessarily out of this provision of the compact, still we can perceive no reason why the assent to it by the people of Kentucky should not be binding on the legislature of that state. Nor can we perceive, why the admission of the conclusion involved in the argument should invalidate an express article of the compact in relation to a quite different subject. The agreement that the rights of claimants under Virginia should remain as valid and secure as they were under the laws of that state, contains a plain intelligible proposition, about the

meaning of which, it is impossible there can be two opinions. Can the government of Kentucky fly from this agreement, acceded to by the people in their sovereign capacity, because it involves a principle which might be inconvenient, or even pernicious to the state, in some other respect? The court cannot perceive how this proposition could be maintained."

The decision in that case is planted squarely upon the ground that the agreement between Virginia and Kentucky was inviolate, because it constituted a compact between the two states, and Kentucky could not abrogate it by legislative enactment, or by amending her constitution, because it was a compact acceded to by her people in their sovereign capacity, which could only be rescinded by the common assent of those who were parties to it. That Mr. Justice Story, who sat in the case and who attained great fame as a jurist and as a writer on the constitution, so understood the principle therein enunciated and that it might be applied to merely political questions, is apparent from the following taken from his commentaries on the Constitution, (Vol. 2, Sec. 1321):

"At the time when the preliminary measures were taken for the admission of the state of Missouri into the Union, an attempt was made to include a restriction prohibiting the introduction of slavery into that state, as a condition of the admission. On that occasion the question was largely discussed, whether congress had constitutional authority to impose such a restriction upon the ground that the prescribing of such a condition is inconsistent with the sovereignty of the state to be admitted, and its equality with the other states. The final result of the vote which authorized the erection of that state seems to establish the rightful authority of congress to impose such a restriction, although it was not then applied. In the act passed for this purpose, there is an express clause, that in all the territory ceded by France to the United States under the name of Louisiana, which lies north of 36 degrees, 30 min. N. Lat. not included within the limites of the state of Missouri, slavery and involuntary servitude otherwise than in the punishment of crimes, whereof the parties shall have been duly convicted, shall be and is hereby forever prohibited. An objection of a similar character was taken to the compact between Virginia and Kentucky, upon the ground that it was a restriction upon state sovereignty. But the supreme court had no hesitation in overruling it, considering it as opposed by the theory of all free governments, and especially of those which constitute the American Republic."

144 In the case of Blue Jacket, for Himself and other Members of the United Tribe of Shawnee Indians, residing in Kansas, v. The Board of Commissioners of the County of Johnson, 5 Wall. 737, the question involved was the right of the state of Kansas to tax the lands belonging to the United Tribe of Shawnee Indians residing in that state notwithstanding the compact between the state and the United States to the contrary. The state contended that this compact impinged upon its sovereignty. Mr. Justice Davis, who delivered the opinion of the court, said:

"There can be no question of state sovereignty in the case, and

Kansas accepted her admission into the family of states on condition that the Indian rights should remain unimpaired and the general government at liberty to make any regulation, respecting them, their lands, property, or other rights, which it would have been competent to make if Kansas had not been admitted into the Union."

In Virginia v. West Virginia, 11 Wall. 39, a compact involving a boundary question between those states was upheld. The third, fourth and fifth paragraphs of the syllabus indicate the subject involved and the holding of the court:

"3. The ordinance of the organic convention of the Commonwealth of Virginia, under which the state of West Virginia was organized, and the act of May 13, 1862, of the said Commonwealth, constitute a proposition of the former state that the counties of Jefferson and Berkeley and others might, on certain conditions, become part of the new state; and the provisions of the constitution of the new state concerning those counties are an acceptance of that proposition.

4. The act of congress admitting the state of West Virginia into the Union at the request of the Commonwealth of Virginia, with the provisions for the transfer of those counties in the constitution of the new State, and in the acts of the Virginia legislature, is an implied consent to the agreement of those states on that subject.

5. The consent required by the constitution to make valid agreements between the states need not necessarily be by an express assent to every proposition of the agreement. In the present case the assent is an irresistible inference from the legislation of congress on the subject."

In Hancock v. Walsh, Commissioner of the General Land Office, 3 Woods, 351, the state of Texas sought to evade the terms of the joint resolution of the congress of the United States for the annexation of Texas which provided that Texas be allowed, as one of the conditions of annexation, to retain the vacant unappropriated lands within her limits, to be applied to the payment of the debts
145 and liabilities of the republic of Texas. The court held it was not within the power of the state government to refuse to comply with the terms of the compact. In discussing the question under consideration, Mr. Circuit Judge Woods, who delivered the opinion of the court, said:

"Whether it be a treaty or a contract, it is alike within the clause of the constitution of the United States which forbids a state from impairing the obligation of contracts: Green v. Biddle, 8 Wheat., 1. If it is to be considered a treaty, it is protected by the second clause of article 6 of the constitution of the United States, which declares, 'This constitution and the laws of the United States, shall be the supreme law of the land.' If this is a treaty the legislature of Texas can no more repeal or annul it than it can annul or repeal a clause in the constitution of the United States. If it is to be considered as a contract it is equally beyond the power of the legislature; for a state is as much forbidden by the constitution from passing laws to impair the obligation of contracts made by herself as by other parties. By no device that a state can resort to can she escape this con-

stitutional prohibition. It is perfectly clear that she cannot authorize her agents to violate her own contracts by leaving it to their discretion whether they shall violate them or not."

United States v. Partello, 48 Fed. 670, and United States v. McBratney, 104 U. S. 621, illustrate the different situations that arise in matters concerning jurisdiction over Indian reservations situated within a state at the time of statehood, where there is a compact relating to this subject and where there is not. In the Partello case there was a compact and it was held that the United States courts had jurisdiction over the crime of rape committed by a white man upon a white woman upon an Indian reservation because the people of the state had full power to relinquish to the United States such jurisdiction, and did so, whilst in the McBratney case the supreme court of the United States held that under the act admitting Colorado into the Union the United States had no jurisdiction of the crime of murder committed by one white man upon another on the Ute Reservation, for the reason that the admission act of Colorado wherein that reservation was situated, "contains no exemption of the Ute Reservation, or of jurisdiction over it," clearly indicating that it would have made a difference in the rule laid down in that case if it had.

146 Ward v. Race Horse, 163 U. S. 504, is another case of this class. The majority opinion was prepared by the present Chief Justice, who distinguished that case from the case of the Kansas Indians, supra, as follows:

"The first case (that of the Kansas Indians) involved the right of the state to tax the land of Indians owned under patents issued to them in consequence of treaties made with their respective tribes. The court held that the power of the state to tax was expressly excluded by the enabling act. The second case (that of the New York Indians) involved the right of the state to tax land embraced in an Indian reservation, which existed prior to the adoption of the constitution of the United States. Thus these two cases involved the authority of the state to exert its taxing power on lands embraced within an Indian reservation, that is to say, the authority of the state to extend its powers to lands not within the scope of its jurisdiction, whilst this case involves a question of whether where no reservation exists a state can be stripped by implication and deduction of an essential attribute of its governmental existence. Doubtless the rule that treaties should be so construed as to uphold the sanctity of the public faith ought not to be departed from."

There are other federal cases bearing directly upon the same question, among which may be mentioned: Beecher v. Wetherby, 95 U. S. 517, which upholds a compact between the United States and the people of the proposed state of Wisconsin, concerning grants of land to the new states; Cooper v. Roberts, 18 Howard, 173, where a similar clause in a compact between the state of Michigan and the United States is upheld; Boyd v. Nebraska, 143 U. S. 135, a compact between the United States and Nebraska relating to naturalization was sustained; and State of Minnesota v. Batchelder, 1 Wall. 109 recognizes the validity of such compacts.

The state courts seems to be in harmony with the federal courts

on this question. Hogg v. Zanesville Canal & Mfg. Co., 5 Ohio, 410; Brittle v. The People, 2 Nebr. 198; Romine v. State, et al., 7 Wash. 215; Duke v. Cahawba Nav. Co., 10 Ala. 82.

The foregoing cases illustrate the wide range of subjects, which the courts have held to be proper subjects of compact between the states and the states and the United States.

If the far greater number and diversity of subjects concerning which the people of proposed states and the United States
147 have deemed it expedient to enter into compacts which are now and for years have been in force unquestioned, and under which the respective sovereignties are working out their common destiny without any apparent consciousness of inequality on that account, could be spread before us within any reasonable space, it would be obvious that Mr. Justice Field did not state the rule too broadly in Ft. Leavenworth R. Co. v. Lowe, supra, when he said:

"Though the jurisdiction and authority of the general government are essentially different from that of the state, they are not those of a different country, and the two, the state and the general government, may deal with each other in any way they deem best to carry out the purposes of the constitution."

Utah furnishes what up — that time was a novel example of such dealing. The enabling act of Utah provides that the constitutional convention, "Shall provide by ordinance irrevocable without the consent of the United States and the people of said state. * * * That polygamous or plural marriages are forever prohibited." The ordinance was adopted in accordance with the terms of the enabling act as follows: "The following ordinance shall be irrevocable without the consent of the United States and the people of this state: First. Perfect toleration or religious sentiment is guaranteed. No inhabitant of this state shall ever be molested in person or property on account of his or her mode of religious worship; but polygamous or plural marriages are forever prohibited." This ordinance has never received judicial interpretation so far as I am aware, but a Senator from that State was tried before the United States Senate for violation of the anti-polygamy law, and its valifity or that it was to be given the force and effect of a compact, was not even questioned by the eminent lawyers who appeared on either side of that celebrated case.

There is a like provision in our enabling act which we accepted: we also agreed not to limit the authority of the United States pertaining to Indians; that perfect toleration of religious sentiment shall be secured; that we will not manufacture, sell, barter or give away intoxicating liquors in that part of the state formerly
148 known as Indian Territory for a period of twenty-one years, etc., etc. All of these agreements limit somewhat the legislative power of the state, and of course, if the view of the majority of the court as expressed by Justice Williams is sound, the state may repudiate those solemn compacts without consulting the federal government or the sovereign people of the state. I cannot give my assent to that proposition. It seems to me that the agreement not to move the state capital until 1913 and not to appropriate and public

moneys of the state for the erection of buildings for capital purposes during such period, involves the least important subject embraced within the enabling act, and if the compact in relation to that cannot be upheld the power of compact between the federal government and the people of a proposed state is limited indeed, and heretofore, has been very little understood by the contracting parties. It is incomparably inferior to the subject of the compact between Virginia and Kentucky upheld in Green v. Biddle, supra. Of that subject Mr. Justice Story said:

"Titles to land cannot be acquired or transferred in any other mode than that prescribed by the laws of the territory where it is situate. Ev*e*y*er* government has, and from the nature of sovereignty must have, the exclusive right of regulating the descent, distribution, and grants of the domain within its own boundaries; and this right must remain, until it yields it up by compact or conquest."

The right of sovereign states to enter into compacts with each other is itself one of the highest attributes of sovereignty. The power exists in full vigor in every state which has not parted with this portion of its natural sovereignty. The limitation upon this great power sanctioned by the majority opinion constitutes to my mind a far greater restriction upon the sovereignty of the state than the exercise by the sovereign people of the proposed state of the power to bind the state, by compact with the United States, not to remove her capital prior to 1913.

149 The enabling act contained propositions only not binding until accepted by the people of the proposed state. The people were free to accept or reject those propositions—indeed Arizona whose admission was provided for by the same enabling act did reject some of its proposals and refused statehood on the terms proposed. Oklahoma could *not* and probably would have done the same if the people had not been satisfied with the terms of her enabling act. If, after statehood, the state becomes impressed with the idea that the terms imposed by the enabling act and accepted by the people in their sovereign capacity, imping-s so greatly upon her rights as a sovereign state that she cannot longer tolerate them, before she would be permitted to repudiate them, if equitable principles were applied, she would be required to tender back to the United States the boon of statehood, return the five million dollar school fund, and the priceless heritage of school and public building lands acquired through the enabling act and its acceptance, and restore everything of value which she received by virtue thereof.

Municipalities as well as individuals ought inviolably to observe their compacts and their promises. Vattel says: Law of Nations, 196) "This great truth is generally acknowledged by all nations: the reproach of perfidy is esteemed by sovereigns a most atrocious affront, yet he who does not observe a treaty is certainly perfidous, since he violates his faith."

150 In the Supreme Court of the State of Oklahoma.

Certificate.

I, W. H. L. Campbell, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the foregoing 149 pages, numbered from 1 to 149 both inclusive, are a full, true and complete transcript of the record and all proceedings in the case of W. H. Coyle, Plaintiff, vs. Thomas P. Smith, Secretary of State of the State of Oklahoma, et al., Defendants, as the same remains on file and of record in my office.

In Witness Whereof, I hereto set my hand and affix the seal of said Court, at Oklahoma City, this 22nd day of February, 1911.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk of the Supreme Court of the State of Oklahoma,

By JESSIE PARDOE, *Deputy.*

Endorsed on cover: File No. 22,562. Oklahoma Supreme Court. Term No. 941. W. H. Coyle, plaintiff in error, vs. Thomas P. Smith, secretary of state of the State of Oklahoma, et al. Filed March 4th, 1911. File No. 22,562.

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CLERK.

NUMBER 941.

IN THE

Supreme Court of the United States.

W. H. COYLE, PLAINTIFF IN ERROR,

VS.

THOMAS P. SMITH, SECRETARY OF STATE OF OKLAHOMA ET AL., DEFENDANTS IN ERROR.

IN ERROR IN THE SUPREME COURT OF OKLAHOMA.

BRIEF FOR DEFENDANTS IN ERROR.

C. B. STUART [redacted]
W. A. LEDBETTER, [redacted]
B. F. BURWELL, [redacted]
J. W. Bailey
Attorneys for Defendant in Error.

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IN ERROR IN THE SUPREME COURT OF OKLAHOMA.

STATEMENT OF CASE.

This action was originally brought in the Supreme Court of the State of Oklahoma, by W. H. Coyle, a resident and citizen of the City of Guthrie, against Thomas P. Smith, Secretary of State of Oklahoma, and certain other state officers to enjoin them from removing any of the books and records from the City of Guthrie to the City of Oklahoma City, and from maintaining their respective offices at Oklahoma City as the capital of the State, or seat of government pursuant to the law enacted by the people of the State of Oklahoma through the State Legislature.

The plaintiff in error relies upon the provision of the Act of the Legislature of Oklahoma of December 7, 1910, for authority to maintain its action. Section 1, of the Act provides as follows:

> "Exclusive original jurisdiction is hereby conferred upon the Supreme Court of the State of Oklahoma to hear and determine any action that may be brought involving the legality of the removal or location or any attempt to remove or locate the State Capital, or any Normal School or other educational or charitable institution of the State. * * * Provided, that any resident taxpayer of the State shall have the right to a hearing before the Supreme Court upon the execution of a good and sufficient bond for costs to be approved by the clerk of the court."

The plaintiff in error contends that the action of the Legislature removing the capital from Guthrie to Oklahoma City is void because in conflict with the provisions of the Enabling Act of Congress which authorized the admission of Oklahoma into the Union as a State.

On the hearing in the Supreme Court of Oklahoma, judgment was rendered in favor of the state officers and against Coyle. See opinion by Mr. Justice Williams in the case of *W. H. Coyle* v. *Thomas P. Smith et al.*, (Oklahoma) not yet officially reported.

From the decision of the Supreme Court of Oklahoma, the plaintiff in error brings the case to this court, asking for a reversal of the judgment rendered by the State Supreme Court.

ARGUMENT AND CITATION OF AUTHORITIES.

This case involves a number of questions which we shall present to the court together with citation of such authorities as we may find bearing upon the different propositions, in the hope that the officers of the State of Oklahoma may not be interfered with in the due and legal discharge of the duties of their respective offices under the existing laws, confidently trusting that this case may reach a speedy determination; that law and right may triumph, and that the solemn acts of the people of the State enacted by the Legislature of the State, may be respected.

SUIT CANNOT BE PROSECUTED FOR BENEFIT OF INDIVIDUALS.

In this case the plaintiff below relies upon the Enabling Act, passed by Congress under the provisions of which Oklahoma was admitted into the Union. The Act referred to is entitled, "An Act to Enable the People of Oklahoma and of Indian Territory to form a Constitution and State government and be admitted into the Union on an equal footing with the original states; and to enable the people of New Mexico and Arizona to form a constitution and State government and be admitted into the Union on an equal footing with the original states."

This Act was approved on the 16th day of June, 1906, and one of the provisions is as follows:

> "The capital of said State shall temporarily be at the City of Guthrie and shall not be changed therefrom previous to *anno Domini* nineteen hundred thirteen, but said capital shall after said year be located by the electors of said State at an election to be provided for by the Legislature; provided, however, that the Legislature of said State, except as may be necessary, for the convenient transaction of public business of said State, at said capital, shall not appropriate any public moneys of the State for the erection of buildings for capital purposes, during said period."

Then the Act further provides: "That the constitutional convention provided for herein shall, by ordinance irrevocable, accept the terms and conditions of this Act."

Pursuant to the requirements of the Enabling Act, the constitutional convention, authorized therein, on the 22nd day of April, 1907, accepted the terms of the Enabling Act, by the adoption of an ordinance in the following language:

> "Be it ordained by the constitutional convention for the proposed State of Oklahoma, that said constitutional convention, do by this ordinance irrevocable, accept the terms and conditions of an Act of Congress, of the United States, entitled 'An Act to Enable the People of Oklahoma and Indian Territory, to form a Constitution and State government, and be admitted into the Union on an equal footing with the original states; and to enable the people of New Mexico and Arizona to form a Con-

> stitution and State government and be admitted into the Union on an equal footing with the original states,' approved June sixteen, *anno Domini*, nineteen hundred and six."

The petition in this case is framed upon the theory that the State of Oklahoma by this action should protect the interests of certain citizens and property owners of Guthrie, it being alleged in the petition that certain persons made valuable improvements in Guthrie relying upon the provisions of the Enabling Act and the irrevocable ordinance heretofore referred to in this brief, and the petition proceeds upon the theory that the Act of the Legislature of Oklahoma in question violates the obligation of contracts; that under the compact or contract between the United States and Oklahoma, the latter contracted not to change the capital from Guthrie until after 1913.

Upon the allegations of the petition, Coyle cannot maintain this action. The individual citizen or property owner in Guthrie acquired no rights under the Enabling Act or the irrevocable ordinance. The individual could not maintain an action in his own name, because he has no interest to sustain such an action as neither the Enabling Act nor the irrevocable ordinance were passed for his benefit. This question was so determined by the opinion of the Circuit Court for the Western District of Oklahoma rendered by the Honorable Ralph E. Campbell, in the case of *Coyle* v. *Haskell et al.*, not officially reported.

The authorities cited in the opinion of Judge Campbell are conclusive upon this subject; one of the strongest cases being *John J. Walsh, Plaintiff in Error* v. *Hocking Valley and Athens R. R. Co.*, 176 U. S. 468; 44 L. Ed. 548.

In this case certain lands were granted to the State of Ohio in consideration of the perpetual maintenance of certain canals to be built from the proceeds to be derived from the sale of such land. The grant contained the provision:

> "That when (the canals) completed or used shall be and forever remain public highways."

The lands occupied by the canals were leased for the building of a railway. The plaintiff whose property adjoined the canal sought to enjoin the railroad company from entering upon the property. The contention in that case was that the accepting of the lands under the grant of Congress constituted a contract, by which the State was bound, and that the plaintiff owning land adjoining the canal might enjoin the railroad company from using the same for a purpose other than that provided in the grant. The court said:

> "Were the question one of doubt, we should hesitate long before refusing to defer to the many opinions of the Supreme Court of Ohio, through several changes in its personnel, holding it to be within the power of the state to abandon the canal for other public purposes, and that such abandonment gave no right of action to private parties incidentally affected or damnified by it; but the State of Ohio does not stand alone in affirming that principle.

"In addition to this, however, the plaintiff stands in no position to take advantage of a default of the state in this particular. He was not a party to the contract between the state and the federal government; his rights were entirely subsidiary to those of the government; and *if the latter chose to acquiesce in the abandonment of the canals, as it seems to have done, he has no right to complain.* He can only sustain this bill upon the theory that his rights are equal to those of the government, and that he can call upon the state to maintain the canal for his benefit.

"The case of *Grinnell* v. *Chicago R. I. & P. R. Co.*, 103 U. S. 739; 26 L. Ed. 456, is pertinent in this connection. That was an action in ejectment brought by a railroad company to recover certain parcels of its land grant, upon which the defendant had settled and asserted rights under the homestead and pre-emption laws of the United States. Their defense was that the company had no title, because it had lost whatever right it had to the lands by a change in the location of the road, and because locating the road as it was completed did not bring these lands within the limits of the land grant act. The court held that the lands being within the limits of the first location, the construction of the road on the new line did not annul or defeat, without further action on the part of the United States, the title thus vested; that Congress had consented to the change without any declaration affecting the title already vested in the company by the first location, and that defendants were bound thereby. In delivering the opinion of the court, Mr. Justice Miller observed: 'Another *point equally fatal to the plaintiff in error is that the assertion of a right by the United States to the land in controversy was wholly a matter between the government and the railroad company, or its grantors.* The legal title

remains where it was placed before the Act of 1864. If the government desires to be reinvested with it, it must be done by some judicial proceeding or by some act of the government asserting its right. It does not lie in the mouth of everyone who chooses to settle on these lands to set up a title which the government itself can only *assert by some direct proceeding. These plaintiffs had no right to stir up a litigation which the parties interested did not desire to be started.* It might be otherwise if the legal title was in the government. Then the land would be subject to homestead or preemption rights.' "

A similar case is that of *VanWyck* v. *Knevals,* 106 U. S. 360, 27 L. Ed. 201, 1 Sup. Ct. Rep. 336. In that case the railroad company had filed a map of definite location, and the land department had withdrawn the odd-numbered sections appropriate thereto; but in constructing the road the company departed from the line indicated. The lands in dispute were within ten miles of the road as built and of the line delineated on the map. They were entered by Van Wyck who received a patent for them, and Knevals, who had acquired his rights from the railroad company, filed a bill against VanWyck seeking to charge him as trustee of the lands, and the court decreed a conveyance accordingly. The defendant attacked the right of the company to grant, alleging that it never completed the construction of the entire road for which the grant was made; that after filing its map with the Secretary of the Interior it changed the route of the road for a part of the distance. The court held, however, that the company had constructed a portion of the

proposed road, and that portion was accepted as completed in the manner required by the Act of Congress; that if the whole of the proposed road had not been completed any forfeiture consequent thereon could only be asserted by the United States through judicial proceeding or through the action of Congress. "*A third party cannot take upon himself to enforce conditions attached to the grant when the Government does not complain of their breach.* The holder of an invalid title does not strengthen his position by showing how badly the government has been treated with respect to the property."

The only contract in this case was between the State of Ohio and the United States. Plaintiff was neither party nor privy to such contract. It was within the power of the government to prosecute the state for a breach of it, or to condone such breach, if it saw fit. As it adopted the latter course, and has deemed it proper to acquiesce in the abandonment of the canals and in the state turning them over to the railroad company, "it does not lie in the mouth of the plaintiff to complain."

In the case of *Coyle* v. *Haskell et al., supra*, Judge Campbell commented upon the case of *Walsh* v. *Columbus, etc., R. R. Co.*, cited above and said:

> "The case of *Walsh* v. *Columbus, etc., R. R. Co.*, 176 U. S. 469, is cited by counsel for defendants as authority denying plaintiff's right to sue. Counsel for complainant conceded that it was first presented, they felt it was almost decisive against them, but on further examination, conceived that it may be properly distinguished from the case at

bar. After a careful study of the case, I am unable to make the distinction. The State of Ohio had passed certain legislation for the incorporation of certain canal companies to provide for the internal improvement of the state by navigable canals. Later, Congress desiring to aid Ohio in the construction of its canals, granted the state 500,000 acres of land within the state for this purpose, with the proviso in the grant, that, 'The said canals, when completed or used, shall be, and forever remain public highways for the use of the government of the United States, free from any toll or charge whatever, for any property of the United States, or persons in their service passing along the same.' This grant was accepted by the express assent of the Legislature of Ohio, and the state took over the land and sold it, devoting the proceeds to the construction and improvement of the canals. The canal in controversy was continued in operation under this arrangement from 1842 to 1894, when the Legislature of the state passed an act abandoning it, and leasing it to the railroad company, for the term of 99 years, with the exclusive right to occupy and use the same. The complainant in that case, had, prior to 1894, become the owner of land at a certain point upon both sides of the canal, and the gist of his complaint lay in the allegation that the Act of the State Legislature authorizing abandonment of the canal, conflicts with the clause of the United States Constitution prohibiting the impairment of the obligation of contracts. A general demurrer having been sustained in the State Trial Court, the case was appealed to the State Supreme Court, and there affirmed as to the point just stated, from whence it came to the Supreme Court of the United States. On the question of the plaintiff's right growing out of the contract entered into between the United States government and the State of Ohio, the courts say:

" 'The only contract in this case was between the State of Ohio and the United States; plaintiff was neither party nor privy to such contract; it was within the power of the government to prosecute the state for a breach of it, and to condone such breach if it saw fit. As it adopted the latter course, and has deemed proper to acquiesce in the abandonment of the canals, and in the state turning them over to the railroad company, *it does not lie in the mouth of the complainant to complain.*'

"This case, and the other authorities therein cited from the Supreme Court of the United States, in my opinion, are decisive against the right of the plaintiff to maintain this action. Here was a contract between the United States government and the state, just as we have at bar, which, while it stood inviolate, afforded certain benefits to the plaintiff, just as this capital contract did to the plaintiff here. When the state, without the express assent of Congress abandoned the canal, substantial injury resulted to the plaintiff, just as substantial injury is alleged to result here. The plaintiff brought suit not against the state, but against the railroad company acting pursuant to the abandonment by the state. Here suit is brought against the various individual officers of the state on the theory that there is no valid law authorizing their action. I can conceive of no substantial difference between the incidental benefits of plaintiff in the case cited arising out of the continuance of the canal, and the incidental benefits of the plaintiff here, arising out of the continuance of the capital in Guthrie, in 1913. As in the case cited, the United States government in this case may decide to acquiesce in the removal of the capital. It is conceded that the plaintiff has no vested right in its remaining at Guthrie, therefore, there is no possible theory in my judgment on which this case may be maintained."

These decisions pointed out in the clearest language that the citizens of Guthrie acquired no rights under the Enabling Act or the Irrevocable Ordinance by reason of having invested money or made improvements in Guthrie after the admission of Oklahoma into the Union. The courts have said that under these provisions they acquired no interest; that no property right is involved and that they can have no standing in court. If they have no rights and cannot maintain an action in their own name, then the inserting of these allegations in the plaintiff's bill regarding property rights, etc., in no manner whatever and to no degree aids the same.

These allegations have no place in the petition in this case. Plaintiff has not and cannot acquire any rights under the Enabling Act and the Irrevocable Ordinance by reason of investments made in Guthrie, and the recitations in the petition with reference to those citizens of Guthrie and their investments are wholly foreign to the real issue in the case, and doubtless will not in any way be considered by the court. But it is insisted that the Act of the Legislature giving to any resident taxpayer the right to a hearing before the Supreme Court of the State, confers upon such taxpayer the authority to maintain this suit. This Act did not grant any authority to the resident taxpayer to enjoin the State from removing its capital or any other institution. The language of the Act is plain. It created no new right, but fixes the jurisdiction of the court and affords a remedy to the resident taxpayer for existing rights or such as

might accrue under existing law. The language of the Act is as follows:

> "Exclusive original jurisdiction is hereby conferred upon the Supreme Court of the State of Oklahoma to hear and determine any question that may be brought involving the legality of the removal or location or an attempt to remove or locate the State Capital or any Normal School or other educational or charitable institution of the State. * * * Provided, that any resident taxpayer of this State shall have the right to a hearing before the Supreme Court upon the execution of a good and sufficient bond for costs, to be approved by the clerk of the court."

The law first confers "Exclusive original jurisdiction upon the Supreme Court of the State of Oklahoma to hear and determine any action that may be brought involving the legality of the removal or location or an attempt to remove or locate the State Capital or any Normal School or any other educational or charitable institution of the State"; and second, it provides that "Any resident taxpayer of the State shall have the right to a hearing before the Supreme Court upon the execution of a good and sufficient bond for costs to be approved by the clerk of the court."

What action might be brought? Only those that could have been brought before the passage of the law. The taxpayer was given the right to test the legality of the removal of any of these institutions under the constitution and laws of the State. It is argued by counsel for plaintiff in error that the Enabling Act and Irrevocable Ordinance constituted a contract or compact. If

that be true the only parties to the contract are the United States and the State of Oklahoma, and the United States alone can maintain an action for its breach. The United States, even if it had the power to do so, has not conferred upon Coyle the right to enjoin the State from violating the Enabling Act, and he has no right to maintain this action.

The United States, even if it could insist upon the compliance with the terms of the Enabling Act as to the Capital provision, which we expressly deny, would have to maintain the action in its own name, and could not confer the right to maintain such action upon Coyle as a citizen. The rights, if any existed under the contract, could not be assigned or transferred by the Government to an individual. The Government is not attempting to do so.

In determining the purpose of the Legislature we must take the law as written in the light of existing conditions, and we should consider the entire law and not a single clause or portion thereof.

It will be observed that the section quoted refers to the Capital of the State, Normal Schools and other educational or charitable institutions of the State. All are placed upon an equality. If this suit involved the removal of the Normal School, would it be contended that an appeal would lie from the judgment of the Supreme Court of the State to this court? Certainly not, and the right of a taxpayer to contest the validity of the removal of the Capital of the State had reference to the Constitu-

tion and Laws of the State and not to the provisions of the Enabling Act, and besides the Act did not pretend to grant the right of an appeal from the judgment of the Supreme Court of the State of Oklahoma to the Supreme Court of the United States.

The right of such an appeal could not be granted by such an act. This appeal is without authority of law, and in our opinion should be dismissed.

The United States can have no interest in the expense of removing the Capital and the expenditure of the State's money in any way it sees fit, and the imposing of taxes upon its citizens for the legitimate expense of government. There is no ground for jurisdiction in the Federal Court by appeal or otherwise, and so long as the United States fails to complain at the conduct of the State, a citizen of the State cannot interfere in the premises.

The capital has already been removed from Guthrie to Oklahoma City and we insist that the questions urged by plaintiff in error in this case are purely moot questions and that this court is not in a position under the law to entertain jurisdiction or to render any judgment except one of dismissal.

THE CAPITAL PROVISION OF THE ENABLING ACT IS NOT BINDING ON THE STATE.

The view taken by counsel for plaintiff in error is not supported either by sound reasoning or by the adjudicated cases. Congress could not impose nor could

the State contract away any of its governmental or political or police powers of the State. When a state is admitted into the Union, it comes in upon an equal footing in every respect with every other state. And on admission of Oklahoma into the Union it became possessed of all the rights of sovereignty with full power to locate its own State Capital without the interference of the Federal Government, the same as every other state had a right to do. The Supreme Court of the United States has had occasion to pass upon the question of the power of the Federal Government to place limitations upon the states when admitting them into the Union. It has been universally held that the Federal Government cannot place limitations or restrictions upon a state which will deprive it of any of its political or police powers *or which will degrade it in its standing with the other states of the Union.* Nothing could be more humiliating or degrading to a state than to be deprived of the right to designate its own seat of government.

We wish to direct the court's attention to some of the cases decided by the Supreme Court of the United States, as well as cases decided by the inferior Federal courts, and by the Supreme Courts of the various states, and in which it is held that a state when admitted into the Union comes in upon an equal footing with the others, and we will also show by these authorities that even the state itself cannot contract away with the Federal Government or with individuals its rights of sovereignty, nor can it contract away any of its political or police powers.

The first case we will call the court's attention to is that of *Bernard Permoli* v. *Municipality No. 1 of the City of New Orleans*, 3 How. 589, 11 L. Ed. 739.

By an ordinance of the city is was made an offense to expose in any of the Catholic churches of the municipality any corpses under the penalty of a fine of fifty dollars. The plaintiff in error performed the religious ceremonies, prayer, etc., over the body of a deceased person in the church, and was prosecuted therefor. It was contended that his conviction was in violation of the Constitution of the United States in that provision which protects the citizen of the respective states in their religious liberties.

The opinion in full is as follows:

> "Mr. Justice Catron delivered the opinion of the Court: As this case comes here on a writ of error to bring up the proceedings of a State court, before proceeding to examine the merits of the controversy, it is our duty to determine whether this court has jurisdiction of the matter.
>
> "The ordinance complained of must violate the Constitution or laws of the United States, or some authority exercised under them; if they do not we have no power by the 25th section of the Judiciary Act to interfere. The Constitution makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws; nor is there any inhibition imposed by the Constitution of the United States in this respect on the states. We must therefore look beyond the Constitution for the laws that are supposed to be violated, and on which our jurisdiction can be founded; these are the following Acts

of Congress: That of February 20, 1811, authorized the people of the Territory of Orleans to form a constitution and state government. By Section 3 certain restrictions were imposed in the form of instructions to the convention that might frame the constitution; such as that it should be republican; consistent with the Constitution of the United States; that it should contain the fundamental principles of civil and religious liberty; that it should secure the right of trial by jury in criminal cases; that the writ of habeas corpus; that the laws of the state should be published, and legislative and judicial proceedings be written and recorded in the language of the Constitution of the United States. Then follows by a second proviso a stipulation reserving to the United States the property of the public lands, and their exemption from state taxation—with a declaration that the navigation of the Mississippi and its waters shall be common highways, etc.

"By the Act of April 8, 1812, Louisiana was admitted according to the mode prescribed by the Act of 1811; Congress declared it should be on the conditions and terms contained in the third section of that act; which should be considered, deemed and taken as fundamental conditions and terms upon which the state was incorporated in the Union.

"All Congress intended was to declare in advance, to the people of the territory, the fundamental principles their constitution should contain this was in every way proper under the circumstances; the instrument having been duly formed and presented, it was for the National Legislature to judge whether it contained the proper principles, and to accept it if it did; or reject it if it did not. Having accepted the constitution and admitted the state, 'on an equal footing with the Original States in all respects whatever,' in express terms, by the

Act of 1812, Congress was concluded from assuming that the instructions contained in the Act of 1811 had not been complied with. No fundamental principles could be added by way of amendment, as this would have been making part of the state constitution; if Congress could make it in part, it might, in the form of amendment, make it entire. The conditions and terms referred to in the Act of 1812 could only relate to the stipulations contained in the second proviso of the Act of 1811, involving rights of property and navigation; and in our opinion were not otherwise intended.

"The principal stress of the argument for the plaintiff in error proceeded on the ordinance of 1787. The Act of 1805 (Chap. 83) having provided that from and after the establishment of the government of the Orleans territory, the inhabitants of the same should be entitled to enjoy all the rights, privileges and advantages secured by said ordinance, and then enjoyed by the people of the Mississippi territory. It was also made the frame of government, with modifications.

"In the ordinance there are terms of compact declared to be thereby established between the original states and the people of the states afterwards to be formed northwest of the Ohio, unalterable, unless by common consent—one of which stipulations is, that 'no person demeaning himself in a peaceable manner shall ever be molested on account of his mode of worship or religious sentiments in the said territory.' For this provision is claimed the sanction of an unalterable law of Congress; and it is insisted the city ordinances above have violated it; and what the force of the ordinance is north of the Ohio we do not pretend to say, as it is unnecessary for the purposes of this case. *But as regards the State of Louisiana it had no further force, after the adoption of the State Constitution than other acts of*

Congress organizing, in part, the territorial government of Orleans, and standing in connection with the ordinance of 1787. So far as they conferred political rights, and secured civil and religious liberties (which are political rights), the laws of Congress were all superseded by the State Constitution; nor is any part of them in force, unless they were adopted by the Constitution of Louisiana as laws of the State. It is not possible to maintain that the United States hold in trust, by force of the ordinance, for the people of Louisiana, all the great elemental principles, or any one of them, contained in the ordinance, and secured to the people of Orleans territory, during its existence. It follows, no repugnance could arise between the ordinance of 1787, and an act of the Legislature of Louisiana, or a city regulation founded on such act; and *therefore this court has no jurisdiction on the last ground assumed, more than on the preceding one.*

"In our judgment, the question presented by the record is exclusively of state cognizance, and equally so in the old states and the new ones; and that the writ of error must be dismissed."

Another very important case is that of *Pollard et al.* v. *Hagan et al.*, U. S. 11 L. Ed. 565. This case considers the question of contract or compact between the Federal Government and the state, and also considers and denies the power of the Federal Government to take away from the states any of their police powers. This opinion was prepared by Mr. Justice McKinley. We invite the court's careful consideration of this opinion and of the reasoning used by Mr. Justice McKinley. His logic is sound and the conclusions reached by him are absolutely destructive of the contention of counsel for plaintiff in error. He said in part:

"The stipulation contained in the sixth section of the Act of Congress, passed on the 2nd day of March, 1819, for the admission of the State of Alabama into the Union, viz: 'That all navigable waters within the said state shall forever remain public highways, free to citizens of said state and of the United States, without any tax, duty, impost, or toll therefor, imposed by said state,' *conveys no more power over the navigable waters of Alabama to the Government of the United States than it possesses over the navigable waters of other states under the provision of the Constitution.*

"And it leaves as much right in the State of Alabama over them as the original states possess over navigable waters within their respective limits. The shores of navigable waters and the soils under them were not granted by the Constitution to the United States, but were reserved to the states respectively; and the new states have the same rights of sovereignty and jurisdiction over this subject as the original states. * * * When Alabama was admitted into the Union on an equal footing with the original states she succeeded to all the rights of sovereignty, jurisdiction and eminent domain which Georgia possessed at the date of the cession, except so far as this right was diminished by the public lands remaining in the possession and under the control of the United States, for the temporary purposes provided for in the deed of cession, and the legislative acts connected with it. *Nothing remained to the United States according to the terms of the agreement but the public lands, and if an express stipulation had been inserted in the agreement, granting the municipal rights of sovereignty, and eminent domain to the United States, such stipulation would have been void and inoperative; because the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or emi-*

nent domain within the limits of a state or elsewhere except in the cases in which it is expressly granted.

"By the sixteenth clause of the eighth section of the first article of the Constitution power is given to Congress 'to exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may by cession of particular states and the acceptance of Congress become the seat of government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same may be, for the erection of forts, magazines, arsenals, dock yards, and other needful buildings.' Within the District of Columbia and the other places, purchased and used for the purpose above mentioned, the national and municipal powers of government of every description are united in the government of the Union. And these are the only cases, within the United States, in which all the powers of government are united in a single government, except in the cases already mentioned of the temporary territorial governments, and there a local government exists. *The right of Alabama and every other new state to exercise all the powers of government, which belong to and may be exercised by the original states of the Union, must be admitted, and remain unquestioned, except so far as they are, temporarily, deprived of control over the public lands.*

"We will not inquire into the nature and extent of the right of the United States to these lands, and whether that right can in any manner affect or control the decision of the case before us. This right originated in voluntary surrenders, made by several of the old states of their waste and unappropriated lands to the United States, under a resolution of the old Congress of the 6th of September, 1780, recommending such surrender and cession, to aid in

paying the public debt, incurred by the War of the Revolution. The object of all the parties to these contracts of cession was to convert the land into money for the payment of the debt, and to erect new states over the territory thus ceded; and as soon as these purposes could be accomplished, the power of the United States over these lands as property was to cease.

"Whenever the United States shall have fully executed these trusts, the municipal sovereignty of the new states will be complete, throughout their respective borders, and they, and the original states, will be upon an equal footing, in all respects whatever. *We, therefore, think the United States hold the public lands within the new states by force of the deeds of cession, and the statutes connected with them, and not by any municipal sovereignty which it may be supposed they possess, or have reserved by compact with the new states for that particular purpose. The provision of the Constitution above referred to shows that no such power can be exercised by the United States within a state. Such a power is not only repugnant to the Constitution, but it is inconsistent with the spirit and intention of the deeds of cession.* The argument so much relied on by the counsel for the plaintiffs, that the agreement of the people inhabiting the new states, 'that they forever disclaim all right and title to the waste or unappropriated lands lying within the said territory; and that the same shall be and remain at the sole and entire disposition of the United States,' *cannot operate as a contract between the parties, but is binding as a law.* Full power is given to Congress 'to make all needful rules and regulations respecting the territory OR OTHER property of the United States.' This authorized the passage of all laws necessary to secure the rights of the United States to the public lands, and

to provide for their sale, and to protect them from taxation.

"And all Constitutional laws are binding on the people, in the *new states* and the *old ones*, whether they consent to be bound by them or not. Every constitutional act of Congress is passed by the will of the people of the United States, expressed through their representatives, on the subject matter of the enactment; and when so passed it becomes the supreme law of the land, and operates by its own force on the subject matter in whatever state or territory it may happen to be. The proposition, therefore, that such a law cannot operate upon the subject matter of its enactment, without the express consent of the people of the new state where it may happen to be contains its own refutation, and requires no farther examination. The propositions submitted to the people of the Alabama Territory, for their acceptance or rejection, by the Act of Congress authorizing them to form a Constitution and State Government for themselves, so far as they related to the public land within that territory, amounted *to nothing more nor less than rules and regulations respecting the sales and disposition of the public lands.* The supposed compact relied on by the counsel for the plaintiffs, conferred no authority therefore, on Congress to pass the act granting to the plaintiffs the land in controversy.

"Alabama is therefore entitled to the sovereignty and jurisdiction over all the territory within her limits, subject to the common law, to the same extent that Georgia possessed it before she ceded it to the United States. To maintain any other doctrine, *is to deny that Alabama has been admitted into the Union on an equal footing with the original states, the Constitution, laws, and compact, to the contrary notwithstanding.* But her rights of sovereignty and jurisdiction are not governed

by the common law of England as it prevailed in the colonies before the Revolution, but as modified by our own institutions. In the case of *Martin et al* v. *Waddell* (16 Peters, 410), the present Chief Justice, in delivering the opinion of the court, said: 'When the Revolution took place the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soil under them for their common use, subject only to the rights since surrendered by the Constitution.' Then to Alabama belongs the navigable waters and soils under them, in controversy in this case, subject to the *rights surrendered by the Constitution to the United States; and no compact that might be made between her and the United States could diminish or enlarge these rights.*

"The declaration, therefore, contained in the compact entered into between them when Alabama was admitted into the Union, 'that all navigable waters within the said state shall forever remain public highways, free to the citizens of said state, and of the United States, without any tax, duty, impost or toll therefor imposed by the said state,' *would be void if inconsistent with the Constitution of the United States.* But is this provision repugnant to the Constitution? By the eighth section of the first article of the Constitution power is granted to Congress 'to regulate commerce with foreign nations, and among the several states.' If, in the exercise of this power, Congress can impose the same restrictions upon the original states, in relation to their navigable waters as are imposed by this article of the compact, on the State of Alabama, then this article is a mere regulation of commerce among the several states, according to the Constitution, and, therefore, as binding on the other states as Alabama.

"This supposed compact is therefore nothing more than a regulation of commerce, to that extent, among the several states, and can have no controlling influence in the decision of the case before us. This right of eminent domain over the shores and the soils under the navigable waters, for all municipal purposes, belongs exclusively to the states within their respective territorial jurisdictions, and they, and they only, have the constitutional power to exercise it. To give to the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of state sovereignty and deprive the states of the power to exercise a numerous and important class of police powers. But in the hands of the states, this power can never be used so as to affect the exercise of any national right of eminent domain or jurisdiction with which the United States have been invested by the Constitution. For, although the territorial limits of Alabama have extended all her sovereign power into the sea, it is there, as on the shore, but municipal power, subject to the Constitution of the United States, and the laws which shall be made in pursuance thereof."

It will be observed from the language used by Mr. Justice McKinley in this case that the Supreme Court of the United States felt called upon to point out the dangers that might arise by reason of the Federal Government assuming police power of the states.

In the case of *Pollard* v. *Hagan*, from which the above quotation is taken, the Supreme Court of the United States said:

> "To give to the United States the right to transfer to a citizen the title to the shores and soils under navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of the state's sovereignty and deprives the states of the power to exercise an enormous and important class of police power, but in the hands of the state, this power can never be used so as to affect the exercise of any national right of eminent domain or jurisdiction with which the United States have been invested by the Constitution."

This same reasoning applies with increased force with reference to the location of the capital of the State. The location of the State capital can never interfere with any of the rights and powers delegated by the states to the general Government. While on the other hand to give to the Federal Government the right to designate the place where the respective state capitals shall be located might be used by the Federal Government, as said by the Supreme Court of the United States, to the detriment and injury of the states. One of the highest attributes of state sovereignty is the right to designate its seat of government, the right to say where the state officers shall reside and discharge the functions of their respective offices, where the Supreme Court of the state shall sit and determine the controversies coming before it, and the place where the Legislature shall convene for the enactment of laws of the state and for the performing of such duties as may be assigned to that department.

The Federal Government cannot have any concern

as to where the state shall fix its capital and its attempt to restrict states in this particular is an unwarranted interference and an excess of the powers delegated to it by the respective states.

In the Permoli case, he claimed a right under the Constitution, and yet the Federal Government refused to interfere, holding in effect that all police power is reserved to the states, and the law which prohibits the exposing of a corpse in a public church is a law enacted under the police power.

Under the doctrine enunciated in each of these cases a new state coming into the Union comes in upon an equal footing with all of the privileges and rights that may be exercised by any other state of the Union and the Enabling Act passed by Congress which authorized the forming of the state government for Oklahoma expressly provides in the caption of the bill that it is an act to enable the people of Oklahoma and of Indian Territory to form a Constitution and state government and to be admitted into the Union on an equal footing with the original states. The standard of rights and privileges to be enjoyed by Oklahoma is expressed in the title of the bill and as decided by the Supreme Court of the United States, are those rights and privileges which may be enjoyed by the original states. Each of the original states when admitted into the Union and ever since that time, as well as every other state that has been admitted since the adoption of the Constitution of the United States, has enjoyed the unquestioned right to designate and to change at will its seat of government.

The Supreme Court of the United States in the Pollard case said that:

> "Alabama is therefore entitled to the sovereignty and jurisdiction over all the territory within her limits subject to the common law to the same extent that Georgia possessed it before she ceded it to the United States. To maintain any other doctrine is to deny that Alabama has been admitted into the Union on an equal footing with the original states, the Constitution, laws and compact, to the contrary notwithstanding."

This language is peculiarly applicable to the capital clause in the Enabling Act for Oklahoma. To maintain that Oklahoma may not change her seat of government, at will, the same as every other state has the right to do, is to deny that Oklahoma has been admitted in the Union on an equal footing with the original states, the Constitution, laws, and alleged compact to the contrary notwithstanding.

The provision in the Enabling Act and the Irrevocable Ordinance adopted by the constitutional convention simply had the effect to recognize Guthrie as the seat of government until such time as the people of the State should see fit to designate some other place as the seat of government.

Throughout the entire litigation, both in the Federal and State courts over the right to change the seat of government from Guthrie to Oklahoma City, in our humble judgment not a single authority has been cited by the other side supporting their contention. While in

every case decided by the Supreme Court of the United States as well as every case decided by the Supreme Courts of the various states in which this principle has been touched upon, the courts have universally held that the states must stand upon an equality and every new state admitted into the Union must be admitted with the power and authority to enjoy every privilege and to exercise to the full extent, the rights and powers of the original states.

We also wish to call the court's attention to the case of *Strader et al.* v. *Graham,* 10 How. (U. S.) 82, 13 Law Ed. 337. This case involves the validity of the Ordinance of 1787, and the Act of Congress of 1798, which extended the Ordinance of 1787 to the Territory of Mississippi. The suit was for the value of certain slaves. Chief Justice Taney, speaking for the court, said:

> "But it seems to be supposed in the argument that the law of Ohio upon this subject has some peculiar force by virtue of the Ordinance of 1787, for the government of the Northwestern Territory, Ohio being one of the states carved out of it.
>
> "One of the articles of this ordinance provides that 'there shall be neither slavery nor involuntary servitude in said territory, otherwise than in punishment for crimes whereof the party shall have been duly convicted: Provided, always, that any person escaping into the same from whom labor or service is lawfully claimed in any one of the original states, such fugitive may be lawfully reclaimed and conveyed to the person claiming his or her labor or service as aforesaid.' And this ar-

ticle is one of the six which the ordinance declares shall be a compact between the original states and the people and states in said territory, and forever remain unalterable unless by common consent.

"The argument assumes that the six articles, which that ordinance declares to be perpetual are still in force in the states since formed within the territory, and admitted into the Union.

"If this proposition could be maintained it would not alter the question. For the regulations of Congress, under the old confederation or the present Constitution, for the government of a particular territory, could have no force beyond its limits. *It certainly could not restrict the power of the states within their respective territories; nor in any manner interfere with their laws and institutions; nor give this court any control over them.* The ordinance in question if still in force could have no more operation *than the laws of Ohio in the State of Kentucky,* and could not influence the decision upon the rights of the master or the *slaves in the state, nor give this court jurisdiction upon the subject.*

"But it has been settled by judicial decision in this court, that this ordinance is not in force.

"The case of *Permoli* v. *The First Municipality*, 3 How. 589, depended upon the same principles with the case before us. It is true that the question in that case arose in Louisiana. But the Act of Congress of April 7, 1898, Chap. 28 (I Stat. at Large, 549) extended the ordinance of 1787 to the then Territory of Mississippi, with the exception of the anti-slavery clause; and declared that the people of that territory should be entitled to and enjoy all the rights, privileges and advantages granted to the people of the territory northwest of the Ohio. And by the Act of March 2, 1805, Chap. 23 (2 Stat. at Large, 322), it was enacted that the inhabitants

of the then Territory of Orleans should be entitled to and enjoy all the rights, privileges and advantages secured by the Ordinance of 1787, and at that time enjoyed by the people of the Mississippi Territory.

"In the case above mentioned, Permoli claimed the protection of the clause in one of the six articles which provides for the freedom of the religion, alleging that it had been violated by the first municipality. And he brought the question before this court upon the ground that it had jurisdiction under the ordinance. But *the court held that the ordinance ceased to be in force when Louisiana became a state, and dismissed the case for want of jurisdiction. This opinion is, indeed, confined to the territory in which the case arose.*

"But it is evident that the ordinance cannot be in force in the states formed in the Northwestern Territory, and at the same time not in force in the states formed in the Southwestern Territory, to which it was extended by the present government. For the ordinances and pledges of the Congress of the old confederation cannot be more enduring and obligatory than those of the new government, nor can there be any reason for giving a different interpretation to the same words used in similar instruments, because the one is by the old confederation and the other by the present government. And when it *is decided that the ordinance is not in force in Louisiana, it follows that it cannot be in force in Ohio.*

"But the whole question upon the Ordinance of 1787, and the Acts of Congress extending it to the other territory afterwards acquired, was carefully considered in *Pollard* v. *Hagen*, 3 How. 212. The subject is fully examined in the opinion pronounced in that case with which we concur; and it is sufficient now to refer to the reasoning, and

principles by which that judgment is maintained, without entering again upon a full examination of the question.

"Indeed, it is impossible to look at the six articles which are supposed, in the argument, to be still in force, without seeing at once that many of the provisions contained in them are *inconsistent with the present Constitution. And if they could be regarded as yet in operation in the state formed within the limits of the Northwestern Territory, it would place them in an inferior condition as compared with the other states, and subject their domestic institutions and municipal regulations to the constant supervision and control of this court.* The Constitution was in the language of the ordinance 'adopted by common consent,' and the people of the territories must, necessarily, be regarded as parties to it, and bound by it and entitled to its benefits, as well as the people of the then existing states. It became the supreme law throughout the United States. *And so far as any obligations of good faith had been previously incurred by the ordinance, they were faithfully carried into execution by the power and authority of the new government.*

"In fact, when the Constitution was adopted, the settlement of that vast territory was hardly begun; and the people who filled it and formed the great and populous states that now cover it became inhabitants of the territory after the Constitution was adopted, and migrated upon the faith that its protection and benefits would be extended to them, and that they would, in due time, according to its provisions and spirit, be admitted into the *Union upon an equal footing with the old states.* For the new government secured to them all the public rights of navigation and commerce which the ordinance did or could provide for; and, moreover, extended to them when they should become

states much greater power over their municipal regulations and domestic concerns than the confederation had agreed to concede. *The six articles said to be perpetual as a compact, are not made a part of the new Constitution. They certainly are not superior and paramount to the Constitution, and cannot confer power and jurisdiction upon this court.* The whole judicial authority of the courts of the United States is derived from the *Constitution itself,* and the laws made under it.

"It is undoubtedly true, that most of the material provisions and principles of these six articles, not inconsistent with the Constitution of the United States, have been the established law within this territory ever since the ordinance was passed; and hence the ordinance itself is sometimes spoken of as still in force. But these provisions owed their legal validity and force, after the Constitution was adopted and while the Territorial Government continued, to the Act of Congress of August 7, 1789, which adopted and continued the Ordinance of 1787, and carried its provisions into execution, with some modifications, which were necessary to adopt its form of Government to the new Constitution. And in the states since formed in the territory, these provisions, so far as they have been preserved, *owe their validity and authority to the Constitution of the United States and the Constitution and laws of the respective states, and not to the authority of the ordinance of the old confederation.* As we have already said, it ceased to be in force upon the adoption of the Constitution, and cannot now be the source of jurisdiction of any description in this court."

We wish also to call the court's attention to the language of Judge Deady in speaking of the constitutional equality of the states in the case of *Case* v. *Toftus* (Oreg.), 39 Fed. 730. He said:

"The true constitutional equality between the states only extends to the right of each, under the Constitution to have and enjoy the same measure of local or self-government and to be admitted to an equal participation of maintenance, administration and conduct of the common or National Government."

We wish also to call the court's attention to the case of *Hinman et al.* v. *E. K. Warren et al.*, 6 Oreg. 408. In this case the United States had patented to one McClure certain tide lands on the Columbia river. The appellant in the case claimed, under conveyance from McClure. The respondents claimed their title from the State of Oregon. The court said:

"Upon these facts two questions arise: First, Do the tide lands belong to the state? Second. Did the patent of the United States invest in the McClures any estate in the land lying between the north line of their claim, as described in the patent, and the line which marks the ordinary high tide?

"In answer to the first question our response is that the tide lands—those that are uncovered and covered by the ebb and flow of the sea—belong to the State of Oregon by virtue of its sovereignty. This docttrine is the clear result of the principle announced in all the cases from *Pollard's Lessees* v. *Hagan*, 3 How. 230, to *Barney* v. *Keokuk*, 4 Otto. 324.

"But it is contended that this sovereignty did not attach until the state was admitted into the Union. This is true, but it is also true that the United States Government has no constitutional or statutory authority to so act towards a territory, or so dispose of the lands within a territory, as to make it impossible to admit such territory

upon an equal footing with the other states of the Union. In all matters which touch the sovereignty the general government is, in the very nature of our system, simply a protector thereof until the territory assumes the ampler powers of a state, and becomes thereby enabled to assert and protect its own sovereignty.

"As the state became owner of the tide lands it had that power, under the provisions of the act providing for the sale of such lands, Miss. Laws, p. 644, to sell the same. It has, however, no authority to dispose of its tide lands in such a manner as may interfere with the free and untrammeled navigation of its rivers, bays, inlets and the like. The grantees of the state took the land subject to every easement growing out of the right of navigation inherent in the public.

"The second question finds its solution in the application of the familiar principle that 'a grant of land adjacent to a navigable river, below the farthest point inland to which the neaptide flows, extends only to the meander line of high tide.' This is the rule laid down by the general government to guide its surveyors. It is of no consequence that the calls of the McClure patent place the north line between high and low water mark. In thus describing the land the officers of the United States government acted without the authority of law, and it is well settled that an unauthorized act binds no one."

This case clearly shows that the general government cannot so act toward a territory as to deprive it of any of its rights of sovereignty after it becomes a State, and the locating of a state capital is the exercise of one of the rights of sovereignty.

Prior to the admission of Oklahoma into the Union

the Federal Government had not attempted to control any new state coming into the Union as to the location of its permanent seat of government.

The rule for which we here contend is also clearly laid down in Tucker on the Constitution, Vol. II, p. 614, Sec. 301. The author says:

> "We have seen that the decisions have been uniform that a state admitted into the Union stands in its relations to the government of the Union in no respect different from those which obtain between the old and original states. The authorities are conclusive upon this point.
>
> "But another phase of the question has arisen. Can Congress refuse admission to a State on a ground not in the Constitution, or admit a State upon conditions which will deny it powers, privileges or rights which by reservation are secured to the old States of the Union under the Constitution? Can Congress impose such a condition upon a new State as will abridge its powers if it enters the Union upon such condition? It would seem that such a proposition is utterly untenable. The States have confided to the Congress as their agent the admission of a State into the Union under the Constitution. Can this constitutional authority in Congress be construed to vest Congress as an agent with power to impose other conditions upon the new member which the Constitution had not prescribed, and if so, does the new State enter the Union shorn of its power *pro tanto* by the agent authorized to open its doors to the new commonwealth without any such condition? And is the State any less a State than its sisters in consequence of Congress having divested it of those qualities enjoyed by the other members of the Union? This would make the Union one

of the unequal members—unequal in the essential qualities which constitute the States of the Union. Judge Story discusses fully the historic Missouri restriction. Congress proposed that Missouri, as a condition of her admission to the Union, should prohibit slavery, and the learned author says the final result of the vote admitting the State 'seems to establish the rightful authority of Congress to impose such a restriction.' This opinion of Judge Story was afterwards reversed by the Supreme Court in *Dred Scott* v. *Sanford, supra.* Whether this restrictive clause was constitutional may be thus tested. It would be conceded by the learned author that Congress at that time could not abolish slavery in Missouri. Could he maintain that after the State was admitted with the restriction imposed, Congress could enforce its restriction by abolishing slavery in Missouri? If such an act by Congress would invade the reserved rights of the State of Missouri, as it would unquestionably have invaded that of Virginia, how could Congress have obtained the power to enforce that restriction by the abolition of slavery in Missouri as a granted power under the Constitution of the United States? The better opinion would clearly be that Congress could not impose as an obligation upon a State at the time of its admission into the Union *such a restriction as it had no original power to exact or enforce. In the absence of such power, to use the power to admit or exclude as the means of enforcing an unconstitutional power would scarcely find an advocate.*"

In the case of *Escanba and Lake Michigan Transportation Company* v. *City of Chicago*, 17 Otto (U. S.) 678-691, 27 Law Ed. 442 the Supreme Court of the United States said:

"The ordinance was passed July 13, 1787, one year and nearly eight months before the constitution took effect; and although it appears to have been treated afterwards as in force, in the Territory, except as modified by Congress; and by the Act of May 7, 1800, (2 Stat. at Large 58) creating the Territory of Indiana and by the Act of Feb. 3, 1909, (2 Stat. at L. 514) creating the Territory of Illinois, the rights and privileges granted by the ordinance are expressly secured to the inhabitants of those territories; and although the Act of April 18, 1818, (Enabling the people of Illinois Territory to form a Constitution and State Government, and the Act of Aug. 26, following, admitting the State into the Union, refer to the principles of the ordinance according to which the Constitution was to be formed, its provisions could not control the authority and powers of the state after her admission. Whatever the limitation upon her powers as a government, whilst in a Territorial condition whether from the Ordinance of 1787, or the *legislation of Congress, it ceased to have any operative force except as voluntarily adopted by her after she became a State of the Union. On her admission, she at once became entitled to and possessed all the rights of dominion and sovereignty which belonged to the original states. She was admitted and could be admitted only on the same footing with them.*

"The language of the Act of Admission is 'On an equal footing with the original states in all respects whatever' (3 Stat. at Large 356). Equality of constitutional right and power is the condition of all states of the Union, old and new. Illinois, therefore, as was well observed by counsel, could afterwards exercise the same power over the rivers within the limits that Delaware exercised over Black Bird Creek, and Pennsylvania over the Schuylkill River."

The Supreme Court of the United States in the case just referred to said: that Illinois on its admission into the Union "became entitled to and possessed all the rights of dominion and sovereignty which belonged to the original states. She was admitted and could be admitted only on the same footing with them."

One of the rights of dominion and sovereignty is the right to say where the state capital shall be, and as was said by Judge Campbell in the case of *Coyle* v. *Haskell,* as governor, *et al.*, not officially reported, this is the first time Congress has attempted to locate the capital of a state. Every other state in the Union has the undoubted right to say where its capital shall be, and may change its location at will. And as was said in the case last referred to "equality of constitutional right and power is the condition of all of the states of the Union old and new."

Therefore, as every other State has the right to locate and to change the location of its own State Capital, Oklahoma could be admitted into the Union only with that same right and privilege. And as a state cannot contract away its governmental powers any contract on her part which would prevent her from changing her seat of government would be absolutely void, as against public policy and the fundamental principles of State government.

Another case bearing upon this question is *Ward* v. *Race Horse* (U. S.) 41 Law Ed. 244, the court said:

> "The treaty made by the United States with the Bannock Indians did not give them the right

> to exercise the hunting privilege therein referred to within the limits of the State of Wyoming in violation of its laws, after the admission of Wyoming into the Union as a State."

The court then quotes from other decisions, and holds in plain and positive terms that each new State is admitted into the Union with all of the powers and privileges which are enjoyed by the other States of the Union and the Standard of privilege and power is fixed by that power and privilege which was enjoyed by the original states. The language in all of the Enabling Acts being

> "Admitted into the Union on an equal footing with the original states in all respects whatever."

It cannot be said that a state which has the right to locate and change at pleasure, its seat of government is on an equal footing with a state that cannot change is capital or seat of government. If the Enabling Act as to the locating of the capital at Guthrie until after 1913, is binding upon the State of Oklahoma, then it is unequal with the other states, *and is degraded and debased in that its position in the Union and its rights and powers as a sovereignty are inferior and unequal with those enjoyed by her sister states.* Such a condition would be an unequal union and would violate the spirit and letter of the Constitution of the United States. No court has ever sustained such a doctrine, and we do not believe that any court ever will.

In the case of the *Willomette Iron Bridge Co.* v. *Hatch,* 125 U. S. 1, 31 L. Ed. 629, the rule is announced, that

> "A new state upon its admission becomes at once possesed of all the rights of dominion and sovereignty possessed by the other states."

In the case of *Williams* v. *Hurt,* 110 Fed. Rep. 166, Judge Baker said:

> "It (the State of Indiana) was admitted into the Union 'on an equal footing with the original states in all respects whatever' * * * The ordinance of 1787 and the other acts above quoted have ceased to operate as limitations on the powers of the state. This state possesses all the sovereign powers possessed by any one of the original states of the Union, in all respects whatever. This is affirmed in many cases by the Supreme Court." Citing many authorities.

From these decisions, it will be observed that the State of Oklahoma has the right to change its seat of government at any time and to any place as the Legislature of its people acting in their legislative capacity may see fit.

CASES RELIED ON BY DEFENDANT IN ERROR.

The learned counsel have cited and rely upon a number of cases, to which we will direct the attention of the court. None of these cases in our judgment in the slightest degree sustain the contention of counsel which is that the State cannot change the capital from Guthrie

to any other place until after 1913. And then only at an election authorized after that time by an Act of the Legislature of the State.

The first of these cases is that of the *State of Minnesota* v. *Batchelder*, (U. S.) 17 Law Ed. 551. The facts in that case were as follows: On Feb. 26, 1857, Congress passed the Enabling Act for the admission of the Territory of Minnesota. By this act certain sections of land were to be granted to the state for school purposes. On March 3, 1857, Congress passed a joint resolution approved by the President which provided that "where any settlements by the erection of a dwelling house, or the cultivation of any portion of the land shall have been or shall be made upon the 16th or 36th sections (which sections have been reserved by the law for the support of schools in the territory) before the said sections shall have been or shall be surveyed, etc.; and if such settlers can bring themselves within the Act of Sept. 4, 1841, (the pre-emption Act) then the right of preference to the 16th and 36th sections, or portions of them so settled and occupied, shall be in them, the same as if such sections had not been previously reserved."

The Supreme Court of the United States simply held that the pre-emption settlers who had taken the land under an act previous to the passage of the Enabling Act, had a right paramount to that of the State.

In that case there was no question of state sovereignty involved. The Federal Government when granting the school lands to the state reserved from the gift

such portions of Sections 16 and 36, as had previously been taken by pre-emptors under a prior existing law. There was no conflict in the law, no conflict between the federal and state government. And no attempt on the part of the Federal Government to take away from the state, any of its powers of sovereignty. A careful examination of the authority will show that it does not bear upon a single proposition involved in the case at bar.

It is said by counsel for the plaintiff in error, that the Enabling Act and the Irrevocable Ordinance constitutes a compact or contract between the Federal Government and the state, which may be enforced and to support this view they cite the case of *Commonwealth of Virginia* v. *State of West Virginia,* 11 Wall 39-65; 20 L. Ed. 67.

The compact relied upon in this case was an agreement as to the establishment of the line between Virginia and West Virginia. The line was not only agreed upon between the two states, but was approved by Congress. In the opinion the court said:

> "In the further consideration of the question raised by the demurrer, we shall proceed upon the grounds which we shall not stop to defend, that the right of West Virginia to jurisdiction over the counties in question can only be maintained by a valid agreement between the two states on that subject and that to the validity of such an agreement the consent of Congress is essential. And we do not deem it necessary in this discussion, to inquire whether such an agreement may possess a

> certain binding force between the states, that are parties to it, for any purpose, before such consent is obtained."

It is the rule recognized by every lawyer that two states have not the power without the consent of Congress to change their boundary line. In this instance the two states had agreed upon the change as to the boundary line and that agreement was assented to by Congress. The change was made in the way authorized under the constitution, and no right of government possessed by the state, was surrendered up by any compact. Three counties wanted to be attached to West Virginia. As to whether or not they should be was left to a vote of these counties. The result of that vote was duly proclaimed, and this controversy was settled by the joint agreement of the two states and Congress.

Another case relied upon by the plaintiff in error is that of *Hogg* v. *Zanesville Manf. Co.*, 5 Ohio, 410.

This case involved the obstruction by a dam of a navigable stream. Damage resulted therefrom and recovery was had. In the opinion the ordinance for the government for the northwest territory is cited and discussed, but independent of that ordinance, the river being a navigable stream, it should have remained open to navigation, to the citizens of the United States and to the United States itself. Insofar as the right of citizens of the United States, and of the United States itself to use navigable streams for purposes of navigation the Supreme Court of the United States has held that this right ex-

ists as fully without any contract or compact between the Federal Government and the state, where such stream is located, in a state as exists under such a contract, and that a contract between the United States and a state with reference to such subject gives to the Federal Government no additional power, because the state cannot contract away any of its sovereign powers and the Federal Government can acquire no additional rights which it does not enjoy under the constitution in the absence of such a contract.

Another case which the defendant in error has urged very strongly is that of *White* v. *Hart*, (U. S.) 13 Wall. 636.

Georgia in adopting its new constitution therein provided:

> "No court or officer shall have nor shall the general assembly give jurisdiction to try or give judgment on, or enforce any debt, the consideration of which was a slave or the hire thereof."

Suit was brought upon a note given for a slave, prior to the adoption of this constitution. It was held that that provision of the constitution insofar as it applied to legal contracts, that is, to notes given prior to the adoption thereof, was void. And that even the people of the state could not by amending its constitution impair the obligation of a contract. Here was a constitutional provision, approved by Congress, which was stricken down insofar as it impaired the obligations of previous valid contracts.

Another case is that of *Romaine* v. *State et al.*, (Wash. 34 Pac. 924).

In the Enabling Act authorizing the admission of Washington it was provided how the school lands should be sold. The constitution provided for their sale in a different way. The state was admitted and the question arose as to the validity of sales made in conflict with the terms of the Enabling Act. The court held that the Enabling Act was a proposition which was modified by the constitution itself, using this language:

> "But an Enabling Act is at most a proposition, and has no binding force upon the people of a territory until they have adopted a constitution and the state has been admitted into the Union, then if, by their constitution, they have expressed no dissent from any proposition contained in the Enabling Act, doubtless they must be held by its condition."

The latter part of the language just quoted, viz.: "doubtless they must be held bound by its conditions" is the language which the counsel for defendant in error claims supports their contention. Such, however, is not the case. The language used in an opinion must always be weighed and considered in the light of the issue involved in the case. And in this particular case the court was dealing with a subject which Congress could rightfully deal with in the Enabling Act and it had in mind those provisions alone and in using the language quoted above it was dealing alone with those propositions and those conditions which the general government had power

to impose. It did not have in mind a limitation upon the police or governmental power of the state. The language had no reference to any of the political powers nor to the exercise of the rights of sovereignty of Washington, as an independent state.

Counsel have also contended that the case of *Briddle* v. *People*, 2 Nebr. 198, supports their contention. We have given this case careful consideration, in the light of this contention, but have failed to find a single line which justifies counsel in citing it as an authority on their side of the case.

The people of Nebraska had adopted a constitution and submitted it to Congress. It had previously been the law that only white male citizens were eligible to serve on a jury. Congress passed an act admitting the state into the Union upon the fundamental condition, that the Legislature of the state by a solemn public act should declare that "within the State of Nebraska there shall be no denial of the elective franchise or of any other right to any person by reason of race or color, except Indians untaxed." This act of the Legislature was transmitted to Congress as was provided it should be. Subsequently a negro was called as a juror and was challenged for cause, and this case presents the sole question as to whether or not he was entitled to sit on the jury. The court held that he was. This provision, however, was in conformity with the Constitution of the United States, and in furtherance of the policy of the National Government, prohibiting discrimination on account of

race, color or previous condition of servitude. And again the act of the Legislature which was transmitted to Congress to the effect that within the State of Nebraska, there should be no denial of the elective franchise, or of any other right, to any person by reason of race or color, had the effect of repealing the territorial law which provided that only male citizens were eligible to serve on a jury.

The act of the Legislature of the state, at least amounted to a law and if so, it repealed the territorial statute because it was in irreconcilable conflict therewith. But the Supreme Court of Nebraska said, passed in the way it was under the circumstances, it became a part of the State Constitution. But in no event did it operate as a surrendering up of any of the sovereign or political powers of the state.

Another case we wish to call attention to is that of *Green et al.* v. *Biddle*, 8 Wheat (U. S.) 1.

This case decided by the Supreme Court of the United States was an action between two individuals brought by one to recover certain lands in the State of Kentucky in the possession of the other and for rents and profits. The State of Kentucky and Virginia had passed certain acts in which it was agreed that the rights of occupants of certain lands in Kentucky should be measured by certain rules. This compact was consented to by Congress. Kentucky was admitted into the Union as a sovereign state upon the conditions mentioned in the compact. The provisions of the compact were upheld, but

the terms and conditions of this compact affected the rights of the citizen of Kentucky and was entered into for the protection of their property rights. Certain rights had been acquired under the laws of Virginia and as this territory was to become a part of Kentucky, the Legislature of that state provided by solemn enactment that these rights of the citizens of Kentucky and was entered into then in force in Virginia, and Congress approved and ratified these enactments. The state did not surrender any of its political or sovereign power, but the court held that these acts were valid and binding and that the citizen whose property rights came within those provisions should be protected thereunder. It does not support the theory that the Federal Government and a state may enter into a contract or compact, by which the state agrees that its capital shall be located at a particular place for a stated period of time.

We wish to call the court's attention to another case which counsel has relied upon, viz.: Case of Kansas Indians, 5 Wall. 737. This case simply held that the lands belonging to the Indian tribes of Shawnee Indians residing in Kansas, were not taxable. And the court said in that case, that there was no question of state sovereignty involved therein.

Inasmuch as counsel have declared their theory to be that a state may contract away its political and sovereign powers to the Federal Government, it is perhaps not surprising that they should grasp at the imaginary straws found in the decisions. But such a doctrine is

absent from them and in some of the cases is expressly repudiated and denied.

Counsel for the defendant in error have also cited certain cases wherein agreements were entered into between a state and the Federal Government with reference to navigable streams, and in this connection we wish to call the attention of the court to the case of *In re Mattson,* 69 Fed. Rep. 535. In this case Oregon in its Constitution assumed concurrent jurisdiction on the Columbia River; subsequently Washington was admitted as a state, and the question of this concurrent jurisdiction is involved in this action. The Enabling Act admitting Washington as a state provided for concurrent jurisdiction. These acts of Congress and of the states have been upheld by the courts, and counsel for defendant in error insists that this is authority to sustain an Act of Congress which has been accepted by an ordinance of a constitutional convention and which deprives the state of the right to change its capital or seat of government for a given time. Such is not the case, as shown by the language used in the opinion. The court says:

> "It is true that the concurrent jurisdiction over boundary rivers has always been assented to by the adjacent states. But in the beginning there were compacts between the original states, or between such states and the general government. The states of Kentucky, Ohio, Indiana and Illinois were within the charter of Virginia at the commencement of the Revolution, and in the compact under which Kentucky became a state Virginia stipulated that the navigation of and jurisdiction over the Ohio River

should be concurrent between the states which should possess the opposite shores. *Handley's Lessee* v. *Anthony*, 5 Wheat. 374. The sovereignty of Virginia entitled her to attach conditions to her grant. The compact was made for the new states, not with them, and the practice of a subsequent acquiescence of the new states is no doubt due to the fact that when new states were created out of the territory of older states, from which they were separated by navigable rivers, the territorial boundaries of such new states extended over no part of the river below low-water mark. The states out of which they were formed, upon a principle that obtains in such cases, retained the entire river within their domain. In such case, the assumption, by the new state having the right of concurrent jurisdiction secured to it, of some jurisdiction, exclusive or concurrent, was thought necessary to the existence of any jurisdiction on the river by such state. *McFall* v. *Com.*, 2 Metc. (Ky.) 394. But this assumption of jurisdiction by one state is not necessary to the exercise of jurisdiction by the other. Concurrent jurisdiction between states separated by navigable rivers is an established rule in this government, although in some instances the entire river is within the territorial limits of one state; and in some cases jurisdiction is limited to the execution of the civil and criminal process of each state upon the adjacent waters within the exclusive jurisdiction of the other. 4 Stat. 708 (approving compact between New York and New Jersey.) *Concurrent jurisdiction is a practical necessity in the administration of government over such rivers. Its existence does not deprive a new state of the dominion and sovereignty belonging to the original states.* The admission of Washington subject to the exercise of a concurrent jurisdiction with Oregon over the Columbia River does not place her upon an unequal footing with the other states.

"On the contrary, this is the footing on which the other states most favored in this respect are placed. It is immaterial that some of the original states made such condition of jurisdiction for themselves, and that others impressed it upon the territory ceded by them. The objection relates to the fact of equality, and not to the authority by which such equality is established.

"It is conceded that Congress could have made the north shore of the Columbia River the boundary of the new state, but it is claimed that having fixed the boundary at the middle of the channel, Congress was without power to authorize any other jurisdiction within such boundary. If Congress might limit the boundary of Washington to the shore of the river without impairing the equality of rights of the state, how can an enlargement of the state's jurisdiction concurrently with Oregon over the entire river be construed to destroy such equality? The question is not to be decided upon a technicality. Whether in legal effect the boundary of each state is limited by its own shore or by the middle channel with concurrent jurisdiction over the river in either case, the result is the same. To say that Congress may establish a concurrent jurisdiction in the one case, but not in the other, is to perplex a grave question with a mere subtlety. When in 1853 the Territory of Washington was created out of the Oregon Territory, Congress established concurrent jurisdiction between the two territories on the Columbia River over all offenses committed on such river. Upon the admission of Oregon into the Union this jurisdiction was confirmed and made to include matters of a civil nature. The solemnity of a compact was given to this boundary and jurisdiction by the Act admitting Oregon into the Union, which could not be abrogated nor altered by the subsequent admission of Washington. *It secured to the new State*

of Oregon, as well as the future State of Washington, such equality of right as existed between all the States separated by navigable rivers, and as was necessary to the effective enforcement of the laws of each. This was a right to which the people of both jurisdictions had long been accustomed. It was such a right as the conqueror of a country would not, under the usage of nations abrogate. Congress, in establishing concurrent jurisdiction between new States thus situated, does not impose upon their sovereignty nor exercise a jurisdiction within them. The authority which it thus exercises is nothing more than that of fixing the boundaries between new States. *This authority is necessary to perfect equality of footing between them*, since it is not otherwise practicable, in such cases to precisely fix a jurisdictional boundary, unless it is placed at one shore, leaving the entire river within the territory and jurisdiction of one State, to the disadvantage of the other."

There are a certain line of cases to which we wish to direct the court's attention, viz: cases in which it is determined that Congress has the right to provide that public lands shall not be taxed for a certain number of years, or until patent issues and which lands have been entered as homesteads or taken by pre-emption by settlers, etc., lands of Indians within a state and on which the state is prohibited from levying taxes for a given number of years, acts of Congress prohibiting the state from exercising jurisdiction on Indian reservations and acts pertaining to navigable waters, etc.

Judge Campbell, in the case of *Coyle* v. *Haskell, Governor, et al.*, discusses this class, and points out that

they are acts of Congress pertaining to the general welfare of the nation, and that they are not acts which have for their object the depriving of a state of any of its political or governmental powers.

I.

THE STATE CAPITAL PROVISION OF THE ENABLING ACT DEPENDS FOR ITS VALIDITY SOLELY UPON THE POWER OF CONGRESS TO LOCATE THE SEAT OF GOVERNMENT OF THIS STATE. IF VALID IT IS BINDING ON THE STATE AS AN ACT OF CONGRESS,—NOT OTHERWISE.

By what authority is the seat of government of the State of Oklahoma established at Guthrie? No provision of the Constitution, and no statute of the State has made Guthrie the seat of government. The sole contention in support of Guthrie is based upon the declaration in the Act of Congress providing for the admission of the State of Oklahoma into the Union, that,

> "The capital of said State shall temporarily be at the City of Guthrie, in the present Territory of Oklahoma, and shall not be changed therefrom previous to *anno Domini* Nineteen Hundred and Thirteen, but said capital shall, after said year, be located by the electors of said State at an election to be provided for by the Legislature."

This provision stands alone in this controversy unaided by the Constitution or laws of the State of Oklahoma. It has never been approved, enacted, accepted or ratified by any authority of the State. It is not now, and never has been, a constitutional provision or law of

this State. If valid, it is so because Congress had the authority to enact it. Since the admission of the State, it is either a nullity or an Act of Congress in force in the State maintaining the seat of government at Guthrie until 1913. Under the same legislative power Congress could have kept the capital at Guthrie for fifty or a hundred years, and permanently located all our county seats.

The Enabling Act did not require this clause to be put into the Constitution, or that it be referred to the people for their approval, and it has never been approved by them. They have never given their sanction to this declaration of Congress, nor was the admission of the State conditioned on their approval of this usurpation on the part of Congress of authority to locate the capital of the State.

The most casual inspection of the Enabling Act shows that the provision with reference to the capital location depends alone for its validity upon the power of Congress to project its legislation into the new State, upon a purely local matter against the will of the people, and in violation of that constitutional equality which is the condition of all the states, old and new.

Section 3 of the Enabling Act contains what may be called the conditions precedent to the admission of the State into the Union. It reads as follows:

> "That the delegates to the convention thus elected shall meet at the seat of government of said Oklahoma Territory on the second Tuesday after

their election, excluding the day of election in case such day shall be Tuesday, but they shall not receive compensation for more than sixty days of service, *and after organization, shall declare, on behalf of the people of said proposed State, that they adopt the Constitution of the United States;* whereupon the said convention shall, and is hereby authorized, to form a Constitution and State Government for said proposed State. *The Constitution shall be republican in form, and make no distinction in civil or political rights on account of race or color, and shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence.*

"And said convention shall provide in said Constitution:

"First: That perfect toleration of religious sentiment shall be secured * * * etc.

Second: That the manufacture, sale, barter, giving away, or otherwise furnishing of intoxicating liquors shall be prohibited * * * etc.

Third: That the people of the State agree that they will forever disclaim all right to any unappropriated public lands, or to all lands belonging to the Indians, and that until the title to the lands shall have been extinguished by the United States the same shall remain subject to the jurisdiction and control of the United States; that lands belonging to citizens of the United States residing without the limits of the State of Oklahoma shall never be taxed at a higher rate than land belonging to residents of the State; and that no taxes shall be imposed by the State on lands or property belonging to the United States. * * *

Fourth: That the debts and liabilities of the Territory of Oklahoma shall be assumed and paid by the State.

> Fifth: That provision shall be made for the establishment and maintenance of a system of public schools * * * etc.
>
> Sixth: That said State shall never enact any law restricting or abridging the right of suffrage on account of race, color or previous condition of servitude."

These requirements were literally complied with, and now constitute Article 1 of the Constitution. They were conditions which the convention was required to comply with before the president could issue the proclamation admitting the State into the Union.

But the mere insertion of these requirements in the Constitution did not give them validity. Their validity, as well as the validity of every other part of the Constitution, depended upon the approval of the people at the election provided for in the Enabling Act.

The declaration that the delegates after the organization of the convention should by resolution adopt the *Constitution of the United States on behalf of the people of the proposed State* was, legally speaking, unnecessary because when the State was admitted it took its place in the Federal Union subject to the Constitution of the United States to the same extent as the other states.

But the intention of Congress that in the adoption of this resolution the people of the State should be bound, is important when we come to consider the other requirement of the Enabling Act which has been so much relied upon by opposing counsel in this case, that

> "The Constitutional Convention provided for herein shall by ordinance irrevocably accept the terms and conditions of this Act."

The declaration is that the convention should accept the terms and conditions of this Act. How, and for what purpose should the convention accept the terms and conditions of the Act? Clearly, with the limitations imposed upon the power of the convention. That is, to frame a Constitution and State government containing the things enumerated in the Enabling Act, and submit the same to the people for their approval or rejection. The acceptance of the Enabling Act by the convention did not imply that the convention should have power to legislate upon the capital question, or any other question, independent of the will of the people.

The requirement that the convention accept the Enabling Act could only mean that the convention should be bound by the limitations of that Act; that it should not exceed the power conferred on it, and that it would insert in the Constitution the several provisions enumerated above.

In accepting the terms and condition of the Enabling Act, the delegates composing the convention agreed to be bound by them as suggestions or instructions to guide them in the formation of a Constitution and State government and in the performance of the other duties imposed upon them.

This precise point was decided by the Supreme Court of the United States in the case of *Permoli* v. *First Mu-*

nicipality, 3 Howard, 589, heretofore cited, with respect to the Enabling Act, under which the Territory of Orleans was admitted into the Union as the State of Louisiana. It was there held *that the provisions of the Enabling Act* requiring the Constitutional Convention to make the State government republican in form, and consistent with the Constitution of the United States, and that it should contain the fundamental principles of civil and religious liberty, and secure the right of trial by jury, and the right of *habeas corpus*, etc., were restrictions "imposed in the form of *instructions* to the *convention* that might form the Constitution."

Opposing counsel in this controversy have insisted that this provision of the Enabling Act conferred legislative power of greatest importance on the convention, independent of the will of the people, and that in the exercise of that legislative power the convention could bind the State not to remove its capital from Guthrie until 1913.

All enabling acts are in their nature temporary measures. They are enacted to accomplish but one purpose, and when that purpose is accomplished or the effort to admit the new state fails, they expire by their own limitation. But one set of delegates can be elected, and but one constitution and state government can be formed. If the people reject the proposed constitution and state government no new set of delegates can be elected; nor can the old delegates reassemble and propose a new constitution unless authority to do so is expressly conferred in the enabling act.

No proposition is better settled in the constitutional history of this country than that every provision of an enabling act which is not continued in force by some provision of the state constitution becomes obsolete and is abrogated and repealed on the admission of the state.

In the case of the *State* v. *Cunningham*, 81 Wis. 511, 15 L. R. A. 567, it was contended that certain acts of Congress and the organic acts of the Territory of Wisconsin guaranteeing proportionate representation from districts remained in force in the State after its admission.

But the Supreme Court of Wisconsin repudiated this contention, and said:

> "The Ordinance of 1787 and the organic Act of April 20th, 1836, were the fundamental law of the Territory and as a Constitution for it until the admission of the State into the Union May 20th, 1848, under its present Constitution on an equal footing with the original states, when the Ordinance of 1787 and the organic Act as well, which were adapted only to the Territorial condition of Wisconsin *became obsolete and ceased to have any operative force except as voluntarily adopted by her after she became a state into the Union.*"

In the case of *Permoli* v. *First Municipality*, *supra*, it was contended that certain provisions of the Enabling Act under which the Territory of Orleans was admitted into the Union as the State of Louisiana continued in force thereafter. The contention of counsel in that case was precisely the same as the contention now urged

against the right of the people to locate the capital, and that is, that certain provisions of the Louisiana Enabling Act, as well as the former Acts of Congress on the subject of religious liberty, continued in force after the admission of the State, and that these provisions constituted a compact between the State and Federal Government, which the State could not disregard.

The contention is repudiated and the Supreme Court says:

> "*But as regards the State of Louisiana,* it (the Act of Congress admitting the state and previous Acts of Congress on the same subject) *had no further force after the adoption of the State Constitution, than other Acts of Congress organizing, in part, the territorial government of Orleans and standing in connection with the Ordinance of* 1787. *So far as they conferred political rights and confer civil and religious liberties* (which are political rights), *the laws of Congress were all superseded by the State Constitution; nor is any part of them in force unless they were adopted by the Constitution of Louisiana as laws of the state.*"

In the case of *Strader* v. *Graham, supra,* the contention was made that certain provisions of an Act of Congress providing for the organization of territories and subsequently the creation of states in the Northwest Territory, continued in force after the admission of the State of Ohio, which was a part of that territory, but this contention was overruled, and the Supreme Court said:

> "And if they could be regarded as yet in operation in the states formed within the limits of the

> Northwest Territory, it would place them in an inferior condition as compared with the other states and subject their domestic institutions and municipal regulations to constant supervision and control of this court."

In the case of *Williams* v. *Hert*, 110 Fed. Rep., page 167, an application was made to the United States Circuit Court for the District of Indiana for a writ of *habeas corpus* to compel the discharge of Hert upon the ground that he was illegally restrained of his liberty, in that he was charged by information with the commission of a felony in violation of the Constitution and laws of the United States. He contended that under the provisions of the Ordinance of July 13th, 1787, providing for the government of the Northwest Territory and by subsequent Acts of Congress, including the Enabling Act, providing for the admission of the State of Indiana into the Union, he was entitled to be tried, if at all, on indictment by grand jury, and that this right was guaranteed to him by the *provisions of an ordinance of the constitutional convention accepting the terms of the Indiana Enabling Act*. On this point the court said:

> "*The representatives of the people of the Territory of Indiana, in convention assembled at Corydon, Ind., on June* 10, 1816, *for themselves and their posterity ordained and declared that they did and would accept the proposition of the Congress of the United States* of April 19, 1816, entitled 'An Act to enable the people of the Indiana Territory to form a constitution and state government, and for the admission of such state into the Union on an equal footing with the original states'; *and the*

said representatives of the people of the Territory of Indiana, in convention assembled, did further declare 'that the said ordinance of the United States and every part thereof should forever remain irrevocable and inviolate without the consent of the United States in Congress assembled first had and obtained for the alteration thereof.'"

(5) The Constitution and state government framed as aforesaid, were approved by Congress and the State of Indiana was admitted into the Union on an equal footing with the original states in all respects whatsoever.

It is contended by counsel for the petitioner that by the foregoing ordinances and provisions the right of the people of the State of Indiana to trial by jury on an indictment by a grand jury in the case of all felonies is made an irrevocable and inviolate guaranty of their liberties. *Hence it is insisted that the Constitution and laws of this state authorizing the trial of felonies by the court on an information are invalid, because the Congress has never released the state from the obligations of the foregoing acts and ordinances.* It is impossible, however, to maintain that the United States holds in trust for the people of the State of Indiana all the great elemental principles of liberty contained in the ordinance, and secured by it to the people of the Indiana Territory during its existence. *The people of this state are sovereign except insofar as their sovereignty has been surrendered to the national government.* This state has never surrendered to the general government its power to provide for the peace and security of the people, and to define

and punish criminal offenses committed in violation of its laws. It was admitted into the Union "on an equal footing with the original states in all respects whatever."

> *"The Ordinance of 1787 and the other acts above quoted have ceased to operate as limitations on the powers of the state.* This state possesses all the sovereign powers possessed by any one of the original states of the Union, in all respects whatever. This is affirmed in many cases by the Supreme Court. *Pollard* v. *Hagan,* 3 How. 212, 11 L. Ed. 565; *Permoli* v. *First Municipality of New Orleans,* 3 How. 589, 11 L. Ed. 739; *Strader* v. *Graham,* 10 How. 82, 13 L. Ed. 337; *Escanaba & L. M. Transp. Co.* v. *City of Chicago,* 107 U. S. 678, 2 Sup. Ct. 185, 27 L. Ed. 442; *Huse* v. *Glover,* 119 U. S. 543, 7 Sup. Ct. 313, 30 L. Ed. 487; *Bridge Co.* v. *Hatch,* 125 U. S. 1, 8 Sup. Ct. 811, 31 L. Ed. 629; *Bolin* v. *State,* 176 U. S. 83, 20 Sup. Ct. 287, 44 L. Ed. 382. The state has the power to determine what acts shall constitute criminal offenses, and to provide the manner in which such offenses shall be prosecuted and tried, and the punishment that shall be inflicted."

Special attention is invited to this case. The Indiana constitutional convention went much further than the Oklahoma constitutional convention in the ordinance accepting the terms and conditions of the Enabling Act and prior Acts of Congress, in that it declared that the provisions of the Enabling Act and prior Acts of Congress "should forever remain irrevocable and inviolate without the consent of the United States in Congress assembled first had and obtained for the alteration thereof"; and yet, the United States Circuit Court held that the state

was not bound by the action of the constitutional convention; that it had exceeded its authority, citing *Permoli* v. *First Municipality*, 3 Howard, 566, 589, and other cases upon which we rely to support our contention that every part of an Enabling Act which is not continued in force by the State Constitution becomes obsolete and is abrogated on the admission of the state.

Under these authorities the state capital provision of the Enabling Act died on the admission of the state. It became obsolete and ceased to have any force whatever when the State was admitted into the Union on an equal footing with the other states.

Under the provision of Section 4 of the Enabling Act the Constitution, and every part of it, was required to be submitted to the electors of the State for their approval, and it was provided therein that if at the election held to approve or reject the Constitution a majority of the votes were in favor of its adoption, a copy of the Constitution should be transmitted to the President, and if the requirements of the Enabling Act were complied with it was his duty to issue the proclamation admitting the State.

The provisions of this section of the Enabling Act precluded the convention from exercising the legislative power necessary to impart validity to the state capital provision of the Enabling Act.

But it is said that the Enabling Act required the convention to adopt an irrevocable ordinance. That simply means an ordinance which the convention could not

revoke; that the delegates composing the convention after entering upon the dischärge of their duties and accepting the terms and conditions of the Enabling Act, agreed thereby to be bound by its limitations, and could not revoke their action and repudiate the limitations imposed upon them.

The delegates were not officers of the State of Oklahoma; they were the agents of the people of the two territories *en masse*, selected to prepare a Constitution and state government to be submitted to the people in order that they might determine whether the state government should be organized. The instant the State was admitted the constitutional convention and the powers of the delegates composing it, became extinct. A new political organism came into being.

Judge Burwell, in his opinion in *Frantz* v. *Autry*, *supra*, speaking of the admission of the state, said:

> "When this is done the entire Constitution, each and all of its provisions *eo instante*, spring into life, and from that time on become the ruling power of the State."

This new ruling power arose out of the sepulcher of the old condition. All back of it, including the territorial government and the constitutional convention, has become abrogated and destroyed. Hence in no possible view of the subject can it be said that the constitutional convention by the ordinance accepting the terms and conditions of the Enabling Act, bound the State; nor was it the intention, either of Congress or the convention, that

the State should be bound by the ordinance. Every other provision which was intended to be binding on the State was required to be put into the Constitution and approved by the people, except the resolution adopting the United States Constitution, and that was required to be done on behalf of the people of the proposed State.

The State capital provision was an unusual and extraordinary one, and if it had been intended that the convention should have power to bind the State with respect thereto, without the approval of the people, certainly an apt provision conferring express authority would have been inserted in the Enabling Act.

Hence it is our contention that the ordinance in question had no reference whatever to the capital provision of the Enabling Act; that that ordinance was binding only on the convention and was intended to prevent the delegates from exceeding the limitations imposed upon them, and to require them to put in the Constitution those things which the Enabling Act required to be put therein, and to exclude therefrom those things which the Enabling Act required to be excluded; that when the Constitution was formed in compliance with the requirements of the Enabling Act, this ordinance had accomplished its full purpose, and when the convention expired the ordinance expired, and ceased thereafter to have any force whatever to abridge the powers of the State.

We also insist that there is nothing in the Enabling Act conferring independent legislative power upon the convention; that while the convention proceeded by legis-

lative method and was authorized to legislate to the extent of adopting an election ordinance under which the Constitution was to be submitted to the people, it possessed no independent power to bind the State with respect to the capital location or any other matter and that the only way by which the State could be bound is pointed out in Section 4 of the Enabling Act, as follows:

> "That in case a Constitution and State Government shall be formed in compliance with the provisions of this Act, the convention forming the same shall provide by ordinance for submitting said Constitution to the people of said proposed State for its ratification or rejection at an election to be held at a time fixed in said ordinance, at which election the qualified voters for said proposed State shall vote directly *for or against the proposed Constitution, and for or against any provisions separately submitted.*"

After providing how the returns of the election shall be made, etc., the Enabling Act contains this significant provision:

> "And if the Constitution and government of said proposed State are republican in form, and *if the provisions of this Act have been complied with in the formation thereof*, it shall be the duty of the President of the United States, within twenty days from the receipt of the certificate of the result of said election and the statement of votes cast thereon and a copy of said Constitution, articles, propositions and ordinances, to issue his proclamation announcing the result of said election; and thereupon the proposed State of Oklahoma shall be deemed ad-

> mitted by the Congress into the Union, under and by virtue of this Act, on an equal footing with the original states."

It thus appears that the plain intention of the Enabling Act was that everything which was to be binding on the people should be submitted to them for their approval; that the requirement that the convention should accept the terms and conditions of the Enabling Act was not intended as a delegation of legislative authority to them.

Under the authorities cited, the State capital provision was repealed and abrogated on the admission of the State and that it finds no support in any constitutional provision or legislation which continued it in force after the admission of the State. It rests, therefore, solely on the power of Congress to locate Oklahoma's capital.

And, being obsolete and utterly nugatory, there was no obligation on the part of the people to respect it, and that in locating their own capital under the bill initiated and approved by them, they were exercising one of the plain functions of state government wholly beyond the reach or control of Congress.

Another view of this question assists our contention, that the Enabling Act, except insofar as was continued in force by the Constitution, became obsolete; and that is that during the territorial condition all legislative power was derived from Congress. Municipal authority

of every kind descended from Congress to the people of the territory, and was exercised by the Territorial Legislature or local city authorities in such manner as the law provided. Upon the admission of the State, however, an entirely new condition arose. All legislative authority was derived from the people, and given expression and form in the Constitution and laws of the State.

This thought is aptly expressed in the case of *Frantz* v. *Autry*, 91 Pac. 193 (at page 202), as follows:

> "In a territory the source of power is Congress, but on the formation of a Constitution and State Government, the power emanates from the people."

The first eight words of our bill of rights are: *All political power is inherent in the people.*

The idea is further expressed by the Supreme Court of the United States in the case of *Bender* v. *Porter*, 9 How., U. S. 242, 13 L. Ed. 119, where the Supreme Court, in speaking of the condition which followed the admission of Florida into the Union, said:

> "We think it clear, therefore, that on the unconditional admission of Florida into the Union as a state, on the 3rd of March, 1845, the *territorial government was displaced, abrogated, every part of it.* * * *
>
> "Without, then, pursuing the examination further, we are satisfied that, in any aspect in which the question can be viewed, whether we look at the effect of the Act of Congress admitting the Terri-

> tory of Florida, as a State, into the Union with her constitutional and organized government under it, alone or in connection with the establishment of a Federal Court within her limits, her admission immediately, and by constitutional necessity, displaced the territorial government, and abrogated all its powers and jurisdiction. The state authority was destructive of the territorial, and in connection with the establishment of the Federal jurisdiction, the organization of the government, state and Federal, under the Constitution of the Union became complete throughout her limits. No place was left unoccupied for the territorial organization."

If by constitutional necessity the State Government abrogated all the territorial powers and jurisdiction, completely reversing the very sources of political power, how can it be said that Congress could project the State capital provision into the new State, thus continuing until 1913 a part of the legislative authority emanating from Congress? On the admission of the State the very source of this legislative power was destroyed, and transferred to the people of the State.

Innumerable authorities have been cited in other briefs in this case, showing that the instant the State was admitted it became the equal of all the other states.

The following expression from the opinion of the Supreme Court of the United States in *Lake Michigan Transportation Company* v. *the City of Chicago,* 17 Otto (U. S.), 678, *27* L. Ed. 442, has been so often quoted

that it has now become a postulate on the equality of states:

> "Equality of constitutional right and power is the condition of all the states of the Union, old and new."

Another favorite declaration expressive of the equality of the states, is the following from the great case of *Texas* v. *White,* 74 U. S. 700:

> "That the Constitution in all its provisions looks to an indestructible Union composed of indestructible states."

This equality and indestructibility spring into life instantly upon the admission of the State, and it ought to be the prayer of every lawyer that they shall continue throughout all time.

It seems to us, therefore, to follow as inevitably as the day follows the night, that Congress has no more power to locate the capital of Oklahoma than it would have to locate the capital of Texas or New York. That in all respects the provision of the Enabling Act declaring that the seat of government of Oklahoma shall remain in Guthrie until 1913, is now, and has been since the admission of the State, utterly void, because it is an unauthorized and unconstitutional attempt upon the part of Congress to project its legislation into the State of Oklahoma upon a matter wholly subject to the legislative control of the State.

II.

THE REMOVAL OF THE CAPITAL OR COUNTY SEAT OF A STATE OR COUNTY DOES NOT INVOLVE THE IMPAIRMENT OF ANY CONTRACT UNDER THE CONSTITUTION. IT INVOLVES THE EXERCISE OF A POLITICAL POWER INHERENT IN STATE GOVERNMENT WHICH CANNOT BE CONTRACTED AWAY TO THE GENERAL GOVERNMENT.

We wish now to direct the attention of the court to a line of cases which involves the removal of capitals of states and of county seats, and to show the court by these decisions that it has been universally held that a State cannot bind itself against the subsequent exercise of any political or governmental power. One Legislature cannot enact a law which may not be repealed by a subsequent Legislature. The State always has the right to enact any law within the limits of the Constitution of the State and which does not violate any of the provisions of the Constitution of the United States.

The first case we will direct the court's attention to is that of *Edwards* v. *Lesueu, Sec. of State,* (Mo.) 33 S. W. 1130. This case is very similar to the one at bar. The contentions in that case were practically the same as the contentions made by counsel in this case. The Supreme Court of Missouri in commenting on the case and the issues involved said:

> "A further charge is, that, by the Act of Congress admitting the State of Missouri into the Union, the action of the convention of the territory, called in pursuance of said Act, and the subsequent legislation of the State, in accepting

and acting upon the conditions of said act, the seat of government was established at Jefferson City, and cannot be changed without the consent of the United States. It was also charged, in substance, that under the Enabling Act, and the acceptance thereof, by the people of the territory, certain lands were donated by the United States to the State of Missouri upon which to locate its seat of government, and such lands were sold by the State with the assurance to purchasers that the seat of government would *permanently* remain at the City of Jefferson and such purchasers, and their assigns relying on the good faith of the State, made valuable and lasting improvements thereon, by reason of all of which they acquired certain vested rights, which should be protected and preserved. A general demurrer to the petition was overruled and the defendant refusing to plead further, judgment was rendered for plaintiff on the demurrer, and a perpetual injunction was granted. From this judgment defendant appealed."

The Constitution of the State of Missouri provided:

"The people of this State have the inherent right to alter and abolish their constitution and form of government whenever they may deem it necessary to their safety and happiness: provided, such change be not repugnant to the Constitution of the United States."

This provision of the Constitution of the State clearly authorized the State of Missouri to change its form of government provided such change be not repugnant to the Constitution of the United States. This provision of the constitution is cited by the Supreme Court of Missouri, as expressly authorizing the State to

change its seat of government. And we will show a little later in this brief that the Constitution of our State is repugnant to the provision of the Enabling Act with reference to the locating of the capital at Guthrie, until 1913, and being in conflict with that provision of the Enabling Act, must prevail over it, even if Congress had the power to bind the State as to its capital, which we most emphatically deny. The court then in commenting upon the right of Missouri to change the location of its capital, said:

> "That all just government is founded upon the consent of the people is a maxim which has been held sacred by the American people since the Declaration of Independence of 1776. Under our system the people are the source of all governmental powers. In recognition of this principle the people of this State, first in delegated convention, and afterwards by their own vote, through the polls, proclaimed in their bill of rights (Sec. 1) 'that all political power is vested in and derived from the people; that all government of right originated from the people, is founded upon their will only and is instituted solely for the good of the whole.' Upon the adoption of the Constitution of 1875 by a popular vote, the direct power of the people was withdrawn from governmental affairs; and the administration of the functions of government was delegated to the executive, legislative and judiciary departments of State to be exercised by officers selected by the people, with such limitations upon the powers of each as they saw fit to impose. But the right to govern was not thereby surrendered or abandoned. The power was reserved to resume control, either of any special sub-

ject matter, by amendment of their organic law, or of the entire subject of government, by means of a constitutional convention."

The court then discusses powers of a State to fix and change its own capital at will, and also discusses the rights of citizens or property owners; that is persons who have acquired property at the seat of government because of the location of the capital at such place. The court said:

"Nor have the property owners of the City of Jefferson secured such vested rights in the location of the seat of government by reason of any implied contract with the State, as will prevent its removal. The Constitution of 1820 declared the exclusive right of the people to regulate the internal government of the State, and to alter their Constitution whenever deemed necessary to their safety and happiness. The reserved power is thus declared by the same convention that accepted the terms of admission of the State into the Union. By this declaration the convention clearly negatives the idea of an intention to bind all future generations to forever maintain the seat of government at such places as might thereafter be selected by commissioners to be appointed by a future Legislature. But neither *the convention nor the Legislature had power, in this respect, to irrevocably bind the people of the State. The right of the people to establish and remove their seat of government at pleasure involves a governmental subject, about which there can be no irrepealable law.* An injunction was sought to prevent the removal of a county seat, on the ground that the citizens had secured a vested right therein, which a removal would violate. The case came before the Supreme

> Court of the United States. That court, speaking through Mr. Justice Swayne, after announcing the principle that one Legislature could not bind another as to subjects of a governmental character, illustrated the proposition in this language: 'If a state capital were sought to be removed under the circumstances of this case with respect to the county seat, whatever the public exigencies, or the force of the public sentiment which demanded it, those interested, as are plaintiffs in error, might, according to their argument effectually forbid and prevent it; and this result would be brought about by means of a bill in equity, and a perpetual injunction. * * * *A proposition leading to such consequences must be unsound. The parent and the offspring are alike.' Newton* v. *Commissioners,* 100 U. S. 560. The claim that property owners will be entitled to compensation in case of a removal is not involved in this proceeding. The power to remove the seat of government does not depend upon the right to compensation. On that question it would be improper for us to express an opinion in advance."

It will be observed that the Supreme Court of Missouri was clearly of the opinion that neither the constitutional convention nor the Legislature of the State had power in respect to the location of the capital to irrevocably bind the people of the State. And they also held and said in express language that the right of the people of the State to establish and remove their seat of government at pleasure, involves a governmental subject about which there can be no irrepealable law.

If the Supreme Court of Missouri was right in its conclusion (and there is no authority that we have

found to the contrary), then neither the constitutional convention of Oklahoma nor Congress could bind the State of Oklahoma, not to change its seat of government for a given period. For as was said by the Supreme Court of Missouri the removal or locating of a capital of a State is a governmental function; and as the locating of the seat of government of a State calls for the exercise of the political or governmental power of the State, such power cannot be contracted away. And any supposed compact with reference to the locating of the capital of the State, for a given period may be disregarded by the State, whenever in its judgment it is to its interest to do so.

Another case which strongly supports the contention of the plaintiff in error in this case is that of *Armstrong and others* v. *Board of Commissioners of Dearborn County* (Ind.), 4 Blackford's R. 208.

> The sylabus of the case states the facts:
>
> "By a statute of 1827 commissioners were appointed to re-locate the seat of justice for Dearborn County, and were authorized to receive donations, etc. The statute provided that as soon as the public buildings were completed at a designated place that place should forever thereafter be the permanent seat of justice of the county. The commissioners fixed the seat of justice at Lawrenceburgh, receiving from certain persons as a donation an obligation conditioned for building a court house there of a certain description. The court house was accordingly built by the donors conformably to their contract, the expense of which was $2,500.

"By a statute of 1835 commissioners were again appointed to re-locate the seat of justice of the same county; but the statute made no provision, in case the seat of justice should be removed from Lawrenceburgh, for the repayment of the donors of the money they had expended in building the court house. These commissioners fixed the seat of justice at Wilmington.

"Held, that the statute of 1835, under the authority of which the seat of justice was removed to Wilmington, was not unconstitutional; and that the removal could not be objected to by the persons who built the court house at Lawrenceburgh merely because they had not been repaid the expense of building it."

The court in discussing these facts in the body of the opinion said:

"The principal question before us involves the rightful exercise, by the Legislature, of the power to locate the seat of justice of a county. That power is denied; indeed it cannot be denied but it is contended that it has been so exercised in Dearborn County as to create a contract by which certain interests have acquired a vested character and therefore no change of the seat of justice can afterwards be made which would divest those interests, without impairing the obligation of a contract. As the power of the Legislature to establish seats of justice in the several counties is conceded that power must be founded upon the general right appertaining to that body to promote the interests and convenience of the people."

And the court then said quoting from Mr. Kent:

"A public corporation instituted for purposes connected with the administration of the govern-

ment may be controlled by the Legislature, because such a corporation is not a contract within the purview of the Constitution of the United States. This is also the doctrine laid down by Story. A county, then, being a public corporation, instituted for purposes connected with the administration of the government is properly the subject of control by the Legislature. With us the exercise of this power in changing and altering the bounds of counties, either adding to or taking from them territory, and in re-locating seats of justice, frequent. The right of exercising this power has never been questioned. It is *a power incident to sovereignty, and secured by the Constitution.*

"The re-location of a seat of justice in a county when demanded by the people of such county, with a view to the advancement of public interest and convenience, is a duty from which a Legislature could not shrink. If, after the location of the seat of justice, and its continuance for many years, individual interest should become identified in its permanency, but these be opposed by the paramount interests and convenience of the public, and a re-location be made—what is the situation of such individual interests, if deteriorated and affected in value by such re-location? Is the public bound to repair losses and afford indemnity? This question can only be answered in the negative. Such losses would be consequential upon the exercise of a public right. They are in a class of cases to which the maxim '*Damnum sine injuria*' applies. Such losses are frequently sustained when from public convenience and necessity a change of a road, a canal, or a railroad, may be demanded and made. The lesser interests, those of individuals, must yield when in conflict with the greater, those of the public. The building of a

> town or village may have been superinduced by positive advantages afforded by a location on a canal, yet, if public convenience and necessity and the interests of the State demand a change, that change can certainly be made without liability to indemnity however fatal and disastrous it may prove to the interest of individuals."

It will be observed that the law locating the county seat of Dearborn County expressly provided that "So soon as the public buildings shall be completed, in the manner aforesaid, at the place so designated, the same shall be *forever* thereafter the permanent seat of justice of said County of Dearborn."

Language could not be used to more definitely fix a permanent seat of government, and yet in the face of this positive language the court said the Legislature had the power to change it at will.

> "If the location *forever* of the seat of justice at Lawrenceburgh, in consideration of the appellants erecting the court house, is not a contract, it is urged that it is a grant, and that the constitution protects all grants, franchises, immunities, etc. The latter conclusion may be conceded, but, from it, it does not necessarily follow that the appellants have had granted to them a franchise immunity, *or any right capable of being asserted in a court of justice.* It does not follow, because certain rights are protected by the constitution, that they are invested with them. This court will never hesitate, when rights are shown to exist and are before it for protection, to extend that protection. We cannot, however, pass beyond the case before us, presume rights, and then afford protection.

Now it is said the appellants have a right capable of being asserted in a court of justice. What is that right? It is called a franchise. What is a franchise? They say, from the books, it is 'a right to have a fair or a market holden at a certain time and a certain place,' etc. Franchises are not only enjoyed in the instance presented, but exist in many other ways. The law regards them as valuable rights, and they cannot be invaded by legislative enactments. 3 Story's Comm. 260. Let us inquire to what the right or franchise claimed by the appellants attaches. To the seat of justice of the County of Dearborn and its records? *If the claim be available, it clothes the appellants with the power of controlling the general policy of the State, the rights of the people of that county, and the administration of justice in it. The State itself is stripped of one of the inherent and essential attributes of sovereignty.* It is compelled, however, imposing its obligations, however changed from the present may be the future aspect of things in that county, however general and unanimous may be the demand of the people for a change of the seat of justice, required equally by their convenience, necessities and interests—to *silence all in the recognition of a principle, not only incompatible with the spirit of the constitution, but alien to the institutions of a free people. Such a claim cannot be supported.*"

In this case the Supreme Court of Missouri was passing upon the right of the State to relocate its capital. And it held that the State had the right to do so, notwithstanding the Act of Congress and the Irrevocable Ordinance adopted by the constitutional convention of Missouri.

The case of *Newton et al.* v. *Board of County Commissioners of Mahoning County*, 26 Ohio State, 618, is also in point. The county seat had been by an act of the Legislature located permanently at Canfield, but one of the provisions of the act was as follows:

> "That before the seat of justice shall be considered permanently established at Canfield the proprietors or citizens thereof shall give bond with good and sufficient security, payable to the commissioners of said county hereafter to be elected, for the sum of $5,000, to be applied in erecting public buildings for said county; and that the citizens of Canfield shall also donate a suitable lot of land on which to erect public buildings."

The citizens in pursuance of this enactment executed the required bond of $5,000 to the county commissioners. They then erected upon a lot of land situate in the town, and owned by Eben Newton, a court house worth at least ten thousand dollars. And Eben Newton then conveyed the lot with the building to the commissioners, reciting in the deed that the lot was to be used "for the sole and exclusive purpose of erecting public buildings for the County of Mahoning. This deed was accepted by the commissioners in full satisfaction of the $5,000 bond referred to above, and was used for county seat purposes until April, 1874, when the Legislature of the State passed another act removing the seat of justice from Canfield to Youngstown. A suit was brought by Newton and others to enjoin the removal of the county seat just as the plaintiffs below have sought in this case to en-

join the removal of the State capital; they claiming in that case in this that it affected the property rights of persons who had invested in and improved property at Canfield; that the law of 1874 impaired the validity of the contract previously entered into between the plaintiffs and the Board of County Commissioners, under the Act of Legislature of 1846, and was therefore contrary to the Constitution of the United States. The court said:

> "To this proposition, we can by no means assent. We think there are three good reasons why it cannot be admitted as the law of the case. 1. The power to establish and remove county seats is one which can *not be parted with by legislative contract.* It is not the subject of contract. No case of authority is cited by counsel, *and it is presumed none can be shown, sustaining or enforcing any such contract; while several cases are adduced* (4 Blackf. 208, 8 Texas (*297*), 111, 336, 13 *Ib.* 456) to show that it is a contract which there is no legislative power to make."

The Supreme Court of Ohio, as will be observed, said in this case, that the power to establish and remove county seats is one which cannot be parted with by legislative contract; that it is not the subject of contract. If this power cannot be parted with by contract because it is not the subject of contract, then a state cannot make any contract or compact which will bind it from removing its state capital whenever it deems it best to do so. And the state can no more contract away its governmental power to the Federal Government than it can to an individual.

The case last referred to was appealed to the Supreme Court of the United States, and the judgment of the Supreme Court of Ohio was affirmed. In 10th Otto. 548-563, also 25 L. Ed. 710, the title of the case in the Supreme Court of the United States being *Eben Newton et al. v. Board of County Commissioners of Mahoning County, Ohio*, the court points out the difference between a contract which affects the property rights of the state and a contract which relates to a public subject. The court said:

> "Undoubtedly there are cases in which a State may, as it were, lay aside its sovereignty and contract like an individual, and be bound accordingly. The cases in which such contracts have been sustained and enforced are very numerous. Many of them are cases in which the question was presented whether a private act of a corporation, or one or more of its clauses, is a contract within the meaning of the National Constitution. There is no such restraint upon the British Parliament. Hence the adjudications of that country throw but little light upon the subject. The Dartmouth College case (4 Wheat. 518), was the pioneer in this field of our jurisprudence. The principle there laid down, and since maintained in the cases which have followed and been controlled by it, has no application where the statute in question is a public law relating to a public subject within the domain of the general legislative power of the state, and involving the public rights and public welfare of the entire community affected by it. The two classes of cases are separated by a broad line of demarcation. The distinction was forced upon the attention of the court by the argument in the Dartmouth College case. Mr. Chief Justice Marshall said:

" 'That, anterior to the formation of the Constitution, a course of legislation had prevailed in many, if not all, of the states, which weakened the confidence of man, and embarrassed all transactions between individuals, by dispensing with a faithful performance of engagements. To correct this mischief by restraining the power which produced it, The State Legislatures were forbidden to pass any law impairing the obligation of contracts; that is, of contracts respecting property, under which some individual could claim a right to something beneficial to himself; and that since the clause in the Constitution must, in construction, receive some limitation, it may be confined, and ought to be confined, to cases of this description; to cases within the mischief it was intended to remedy.

" 'The general correctness of these observations cannot be controverted. That the framers of the Constitution did not intend to restrain the states in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed, may be admitted. The provision of the Constitution never has been understood to embrace other contracts than those which respect property, or some object of value and confer rights which may be asserted in a court of justice. It never has been understood to restrict the general right of the Legislature to legislate on the subject of divorces * * * If the act of incorporation be a grant of political power; if it create a civil institution to be employed in the administration of the government; *or if the funds of the college be public property; or, if the State of New Hampshire, as a government, be alone interested in its transaction, the subject is one in which the Legislature of the State may act according to its own judgment, unrestrained by any limitation of its power imposed by the Constitution of the United*

States. The judgment of the court in that case proceeded upon the ground that the college was 'A private eleemosynary institution, endowed with a capacity to take property for purposes unconnected with the Government, whose funds are bestowed by individuals on the faith of the charter.' * * *

"It is hardly possible to conceive the grounds on which a different result could be vindicated, without destroying all legislative sovereignty, and checking most legislative improvements and amendments, as well as supervision over its subordinate public bodies."

"The legislative power of a state, except so far as restrained by its own constitution, is at all times absolute with respect to all offices within its reach. It may at pleasure create or abolish them, or modify their duties. It may also shorten or lengthen the term of service. And it may increase or diminish the salary or change the mode of compensation. *Butler* v. *Pennsylvania*, 10 How. 402.

"The police power of the states, and that with respect to municipal corporations, and to many other things that might be named, are of the same absolute character. Cooley, Const. Lim. pp. 232, 342; *The Regents* v. *Williams*, 9 Gill. & J. 365.

"In all these cases there can be no contract and no irrepealable law, because they are 'governmental subjects,' and hence within the category before stated.

"They involve public interests, and legislative acts concerning them are, necessarily, public laws. Every succeeding Legislature possesses the same jurisdiction and power with respect to them as its predecessors. The latter have the same power of repeal and modification which the former had of enactment, neither more nor less. All occupy, in this respect, a footing of perfect equality. This must necessarily be so in the nature of things. It

is vital to the public welfare that each one should be able at all times to do whatever the varying circumstances and present exigencies touching the subject involved may require. A different result would be fraught with evil.

"All these considerations apply with full force to the times and places of holding courts. They are both purely public things, and the laws concerning them must, necessarily, be of the same character. If one may be bargained about, so may the other. In this respect there is no difference in principle between them.

"The same reasoning, pushed a step further in the same direction, would involve the same result with respect to the seat of government of a state.

"*If a state capital were sought to be removed, under the circumstances of this case with respect to the county seat, whatever the public exigencies or the force of the public sentiment which demanded it, those interested, as are the plaintiffs in error, might, according to their argument, effectually forbid and prevent it; and this result could be brought about by means of a bill in equity and a perpetual* ***injunction.***

"It is true a state cannot be sued without its consent, but this would be a small obstacle in the way of the assertion of so potent a right. Though a state cannot be sued, its officers whose acts were illegal and void, may be. *Osborne* v. *Bk.*, 9 Wheat. 738; *Davis* v. *Gray, supra.*

"A proposition leading to such a consequence must be unsound. The parent and the offspring are alike. *Armstrong* v. *Comrs.*, 4 Blackf. 208."

The Supreme Court of the United States anticipated in its illustration the very condition which is presented by the record in this case, and it says that if a state cap-

ital were sought to be removed, injunction would not lie to prevent it. Its exact language was:

> "A proposition leading to such consequences must be unsound. The parent and the offspring are alike."

The Supreme Court of the United States in the case last referred to lays down the rule in the most positive language that whenever a legislative enactment has reference to a public subject, a subject affecting the public welfare and which pertains to the political power of the state, if within the limits of the constitution, should be upheld because those powers cannot be contracted away by the state. Following the reasoning and rules laid down by the Supreme Court of the United States, the injunction in this case should be denied.

We are also fortunate in having another authority decided by a court of high standing in the country, wherein the removal of the capital of the state was involved. We refer to the case of *John Slack, Sr., and others*, v. *John J. Jacob et al.*, reported in the 8 W. Va. 612. In this case the Legislature enacted a law in which the Capital of West Virginia was removed from the City of Charleston to Wheeling, West Virginia. The law also authorized the governor of the State to make provision for the proper quarters for the State officers and for the removal of the books, etc., of the various State offices from Charleston to Wheeling. The contention was, that under a previous Act of the Legislature, the capital was located at Charleston under the conditions which in-

volved contractual relations which could not be violated by the State. Injunction was sought to prevent the governor and other State officers from removing the books and records. The court said:

> "A judge of a circuit court in vacation or a court of equity had not power or authority to enjoin by injunction John J. Jacob as a citizen, or as governor of the State, or other officer or officers, person or persons acting under his authority as governor of the State, or by his discretion, in the execution of said act of the Legislature from removing from the City of Charleston to the City of Wheeling the papers and movable property in said act mentioned, until the constitutionality and validity of the said act was judicially determined, although the bill praying for the injunction alleged the unconstitutionality of the Act; the powers and duties springing from said Act, and the Constitution being executive, and of such nature that enjoining the governor from executing said Act was an invasion by the judiciary of executive powers and duties, devolved upon the governor as chief executive of the State. * * * The courts have no right to set aside, to arrest or nullify a law passed in relation to a subject within the scope of the legislative authority, on the ground that it conflicts with their notions of natural rights, absolute justice or sound morality."

In this case the court also lays down the rule that the subordinate officers in the executive department, acting under the authority and direction of the governor, cannot be enjoined any more than the governor. Because under the Constitution of the State of West Virginia (as under the Constitution of Oklahoma) the gov-

ernor of the State is the chief executive officer in the executive department and the subordinate officers of that department should obey his instructions when ordered to carry out the provisions of a law. And to enjoin the inferior executive officers is, in our humble judgment, as much an invasion of the executive department in a matter of this kind as it would be if the court were to enjoin the governor himself. Many of the courts have said that the immunity of the governor from processes of the court extends to his subordinates when acting under his direction, for in many matters he can only act through subordinates in his department. To interfere with the subordinates in the executive department when such officers are acting under the direction of the governor, and in matters which pertain to the administration of the government of the State, is as much an interference with the governor himself and with his office as it would be to interfere with the administration of the court by preventing its clerk to record its orders and judgments. The court cannot discharge its duties and carry out the functions of its office and give force and effect to the same without a clerk to record its proceedings and a sheriff or marshal to execute its decrees and judgments.

The Supreme Court of Texas has had occasion to consider the principles involved in this case in at least two different cases, and we direct attention of the court to the case of *Alley et al.* v. *Denson, Chief Justice,* 8 Texas, 151. The court said:

"But independently of the election, we entertain no doubt of the constitutional authority of the Legislature to remove the seat of justice of the county. Counties are public corporations. They are created for political purposes, and are subject to the control of the legislative power of the State. 2 Kent's Com. 275. 'A public corporation instituted for purposes connected with the administration of the government may be controlled by the Legislature, because such a corporation *is not a contract within the purview of the Constitution.*'

"The questions presented in the present case were considered by the Supreme Court of Indiana in the case of *Armstrong* v. *Commissioners*, a parallel case to the present. 4 Blackf. R. 208. By a statute of 1827, commissioners were appointed to relocate the seat of justice for Dearborn County, and were authorized to receive donations, etc. The statute provided that as soon as the public buildings were completed at the designated place that place should forever thereafter be the permanent seat of justice of the county. The commissioners fixed the seat of justice at Lawrenceburgh, receiving from certain persons as a donation an obligation conditioned for building a court house there. The court house was built by the donors conformably to their contract. By the statute of 1835 commissioners were again appointed to relocate the seat of justice of the county, but the statute made no provision, in case of removal, for the repayment to the donors of the money they had expended in building the court house. The seat of justice was removed to Wilmington. Upon these facts the court held that the statute of 1835, under the authority of which the seat of justice was removed to Wilmington, was not unconstitutional, and that the removal could not be resisted by the persons who built the court house, although no compensation was provided or made them for

the building of the court house and the injury sustained by them."

Another case is that of *Walker et al.* v. *Tarrant County*, 20 Tex. 16. The court said:

> "The location and removal of county seats pertain to the legislative department; if that department acts directly, no judicial question can be made as to the propriety or validity of its action; and if it acts through the medium of officers or agents, no judicial question can be made as to the propriety or validity of the acts if the officers or agents, unless the Legislature makes special provision therefor. It would seem that where a county seat is removed, the county will not be enjoined from selling unsold lots at the suit of the donor who gave the land to the county on condition of the location of the county seat thereon. * * *
>
> "The act of determining in what particular place in a county the courts shall be held, and the public records shall be kept, is the exercise of a political authority of the government, pertaining to the Legislature. It may be done directly, as by naming and identifying a place in the Act; or it may be done indirectly, by making it depend upon a contingency and appointing an agent or agents to determine upon that contingency, and to announce the result. Whether it be done the one way or the other, it, in all its parts, is no less an act pertaining to the political and not to the judicial authority. * * * no citizen of a county has a vested right in the locality of the county seat by living in it, or near it or by living in the county."

The locating and removal of the capital of a state like the locating and removal of a county seat is the exercise of the political power of the state, over which the courts can exercise no judicial control.

In the case of *State of Louisiana ex rel John Elliot et. al.* v. *Allen Jumel, Auditor of the State of Louisiana et al.*, 107 U. S. 815, 27 L. Ed. 448, the Supreme Court, speaking through Chief Justice Waite, said:

> "A court cannot assume the executive authority of a state, so far as it relates to the enforcement of a law, and supervise the conduct of persons charged with official duties, in respect to the levy, collection and disbursement of the tax to pay state bonds, in a proceeding in which the state as a state is not and cannot be made a party. Courts cannot, when a state cannot be sued, set up jurisdiction over the officers in charge of the public moneys, so as to control them, as against the political power in their administration of the finances of the state."

Neither can the officers of a state charged with the exercise of the political powers of the state, be enjoined from discharging their duties under those political powers any more than the state itself can be enjoined from exercising those powers, because the state can only act through its duly elected or appointed officers and representatives. It is the universal rule laid down by all of the courts that have passed upon the question, so far as we have been able to investigate, that the locating or removing of a county seat or of the capital of the state is the exercise of political power. Other courts have characterized it as the exercise of the police power of the state, because it pertains to the public welfare of the state, to the convenience and due and proper exercise of the governmental powers of the state. Being a political power it

could not be contracted away by the constitutional convention, nor by the state itself, to the Federal Government nor any individual. The Federal Government has only those powers and rights of control over a state and its internal government as have been granted to it either by the express or implied terms of the Constitution of the United States. The provision of the Enabling Act which provides that the temporary seat of government shall remain at Guthrie until 1913, is absolutely void and its enactment was beyond the legislative powers of the Federal Government, and the Irrevocable Ordinance adopted by the constitutional convention, insofar as it approved the capital provision of the Enabling Act, was in excess of the powers of that body. It could not by compact or ordinance deprive the future state of its right to exercise any of the political powers enjoyed by the original states of the Union.

ENABLING ACT AND IRREVOCABLE ORDINANCE ARE IN CONFLICT WITH THE PROVISIONS OF THE CONSTITUTION OF THE STATE.

We have shown by many authorities that the right to locate and to change at will the seat of government of a state or the county seat of a county is the exercise of the political powers of the state. We have also shown by adjudicated cases that wherever the Enabling Act for the admission of a state into the Union is in conflict with the constitution of such state adopted under such Enabling Act and approved by Congress or by the President of the

United States that the provisions of the Constitution of the state prevail over the terms of the Enabling Act and insofar as the two instruments are in conflict, the Constitution renders the Enabling Act a nullity.

In *Roumaine* v. *State et al.* (Wash.) 34 Pac. 924, the court had occasion to consider a conflict between the terms of the Enabling Act for the admission of the State of Washington, and certain provisions of the State Constitution. The Enabling Act provided that the school lands should be sold in a certain way. The Constitution of the State provided for their sale in a different manner. The state was admitted and the question arose as to the validity of the sales made in conflict with the terms of the Enabling Act. And the court held that as the Constitution of the State provided for the sale of certain school lands in a manner different from that provided for in the Enabling Act, and the Constitution was approved by Congress, its terms prevailed over the Enabling Act, and this should be so.

An Enabling Act is nothing more or less than a proposition on the part of the Federal Government for the admission of a Territory into the Union. This was the effect of the Enabling Act passed by Congress for the admission of Oklahoma. Oklahoma then adopted a constitution which was approved by the President of the United States under the authority of Congress which had all of the force and effect as though approved by Congress itself.

This constitution adopted by the people of Oklahoma, absolutely reserves the right of the people of the State to change its seat of government at such time and place as it might deem for the best interest of the State.

Section 1, Article 2, of the Constitution of Oklahoma provides as follows:

> "All political power is inherent in the people; and government is instituted for their protection, security, and benefit, and to promote their general welfare; and they have the right to alter or reform the same whenever the public good may require it; provided, such change be not repugnant to the Constitution of the United States."

By this provision of the constitution which was ratified by the President under the direction of Congress, all political power was reserved to the people of the State. And by the expressed declaration of the Constitution of the State they reserved the right to alter or reform the government, its policies and its institutions and to change the same whenever the public good might require it. Provided, such change be *not repugnant to the Constitution of the United States.* There is but one limitation upon the right of the people of Oklahoma to change their government or its institutions or the locating of the seat of government and that limitation is that it be not repugnant to the Constitution of the United States. It will be observed that the constitutional convention and the people of the state in adopting their constitution clearly eliminated the question that they could not change the seat of government if that change be in conflict with

the Enabling Act. But they reserved to themselves the right to exercise all political power which includes the right to change their seat of government in any way they might see fit so long as such change is not repugnant to the Constitution of the United States. No lawyer will contend that there is a single line in the Constitution of the United States which in any way restricts the State of Oklahoma in the changing of its seat of government as its people may deem best for the public welfare. And it is for the people of the State alone to say as to whether or not such a change is for the benefit of the public welfare. That is a political question which the court cannot determine and it cannot set up its judgment of expediency, propriety or as to the best interest of the state, against the judgment of the legislative department. Courts are organized and their sole power and jurisdiction is to determine the rights of persons and property and to aid the executive department in maintaining a condition of public peace, public health and public safety. As for instance in maintaining public peace by enjoining riots, strikes, etc., in maintaining public health, in enjoining public nuisances, which affect the health of the community, in maintaining public safety, by enforcing the criminal laws of the State, but the management and control of the affairs of government are solely and exclusively within the executive department under the direction of the Legislature and it is made by the Constitution of the State, the absolute sworn duty of the Governor, to see that the laws are executed and obeyed.

We have examined the brief filed by the plaintiff in error with care but failed to find any authorities cited therein which in our judgment sustains his contention. We have recognized all through this litigation that a Territory asking admission into the Union as a State may enter into certain contracts and compacts with the Federal Government with reference to property interests, or in which it agrees not to tax the lands of Indians or the Public Lands of the United States within the State, or any of those matters which do not in any way pertain to the political or police powers of the State, but we think it is fundamental that the Federal Government cannot impose conditions upon a new State as a condition precedent to its admission and which may afterwards be enforced when it could not contract with a State already admitted pertaining to such subject, and we believe under the law that the Federal Government could not make a contract with the State of New York, Pennsylvania, Texas, Louisiana, or any of the States already admitted by the terms of which the Federal Government could designate where the capital of such State should remain for three years, ten years, one hundred years, or for any number of years.

If the Enabling Act pertaining to the maintaining of the capital at Guthrie until 1913, is binding upon the State of Oklahoma, then, as suggested before in this brief, it could have required the State to leave it there for one hundred years, or permanently. It could also, with equal propriety, have designated the number of

counties which the State should have, fixed the boundaries thereof, located the county seats, established the educational institutions of the State, fixed the number of State officers, and provided for the salary of each, could have fixed the jurisdiction of the respective courts of the State, provided what persons within the State could hold office, and in fact provided for the entire government of the State, and under the guise of a contract or compact, deprived it of every right of sovereignty. This certainly could not be done.

The States reserve the right of self-government and delegate to the General Government ~~of the State~~ only those powers which were necessary and incident to its general supervision, control and maintenance. Once the power of Congress to limit the police power of the State is conceded, there are no limits to which the State may not go in contracting away its rights of sovereignty.

We believe it was the intention of the framers of the Constitution that the respective states should be equal, equal in power, equal in privileges, possess equal rights of internal government, equal powers to enact laws and to repeal the same, and establish and locate its institutions and to change the same. Any other theory, as suggested in a number of the decisions of this court would degrade and debase the State.

The contention of appellant that the right to contract to locate the capital at Guthrie until 1913, is one of the strongest proofs of sovereignty, and is in viola-

tion of the theory of State Government. We believe that it is fundamental that the locating of the capital of the State or of any other State Institution, pertains to the political power of the State or to the government of the internal affairs of the State, and the State cannot make any valid contract which will deprive it of this right and power. A State like an individual may contract with reference to property interests, but surely it cannot contract away the police power of the State. Because the State is sovereign, it cannot surrender its right to govern and its right to exercise its police power.

Every power conferred upon the Federal Government by the Constitution by express provisions or which are necessarily incident to the exercise of the powers conferred, should be exercised by the Federal Government, but it should as jealously guard the rights and powers of the State as it would defend its own rights when invaded.

The foregoing brief is respectfully submitted.

C. B. STUART [redacted]
W. A. LEDBETTER, [redacted]
B. F. BURWELL, [redacted]
J. W. Bailey
Attorneys for Defendants in Error.

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IN THE

Supreme Court

OF THE

United States

W. H. COYLE, Plaintiff in Error.
vs.
THOMAS P. SMITH, Secretary of The State of Oklahoma, et al. Defendants in Error.
NO. 941.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

JOHN H. BURFORD,
FRANK DALE,
A. G. C. BIERER,
FRANK B. BURFORD,
C. G. HORNER,
BENJ. F. HEGLER,
Attorneys for Plaintiff in Error.

Leader Print, Guthrie, Okla.

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NO. 941.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA. BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

This cause was instituted in the Supreme Court of Oklahoma under the authority of an act of the legislature which authorized the bringing of such action in that court, and gave it original jurisdiction to determine the questions involved. This act was approved December 7th, 1911, and is not yet published.

By Section 1 of the act it is provided:

"Exclusive original jurisdiction is hereby conferred upon the Supreme Court of the State of Oklahoma to hear and determine any action that may be brought involving the legality of the removal or location or an attempt to remove or locate the State Capital or any Normal School

or other educational or charitable institution of the State, * * * provided, that any resident taxpayer of this State shall have a right to a hearing before the Supreme Court upon the execution of a good and sufficient bond for costs, to be approved by the Clerk of the Court."

The petition in this cause was filed by plaintiff in error in conformity with said legislative act, praying an injunctional order restraining the defendants and each of them and their successors from moving or attempting to move from the City of Guthrie any of the records, documents, files, archives, etc., pertaining to their several offices and belonging to the State, or from attempting to transact any official business of the State appertaining to their several offices, which is required to be performed at the seat of government, at any other place than the City of Guthrie, until such time as the permanent seat of government of said State should be located by a vote of the electors, after the year 1913. All of the State officers, and State Boards, except the Governor, were made defendants in the action.

The petition sets up the fact of the passage of an act of the Congress of the United States, entitled, "An Act to enable the people of Okla-

homa and Indian Territory to form a constitution and state government and be admitted into the Union on an equal footing with the original states; and to enable the people of New Mexico and Arizona to form a constitution and state government and be admitted into the Union on an equal footing with the original states," which said act was approved June 16th, Anno Domini, 1906. (34 Stats. L. 267.)

The petition then alleges the adoption of the terms and provisions of said Enabling Act above referred to by the Oklahoma Constitutional Convention and further alleges that the legislature of the State of Oklahoma, in violation of the provisions of said Enabling Act referred to above, by an act, approved by the Governor, December 29th, 1910, not yet published, undertook to locate the permanent seat of government and capital of the State of Oklahoma at Oklahoma City in said State. Section 1 of the act in question contains the following:

> "The permanent seat of government and capital of the State of Oklahoma shall be and is hereby established at Oklahoma City in the County of Oklahoma, in the said State. * * * "

Section 2 of said act provides that a commission, to be known as the State Capital Com-

mission, shall be created, composed of three qualified electors, to be appointed by the Governor, each of whom should be paid a salary of four thousand dollars ($4,000.00) per annum. The term of office of said commissioners is fixed at two years.

Section 3 provides that the commissioners so appointed shall have power to make all necessary contracts on behalf of the State in securing, by gifts or donations, moneys for the purpose of creating a fund to be known as a State Capital Fund.

Section 4 provides that the commission shall have the power to employ a competent engineer and architect and procure all help and assistance, legal, clerical and otherwise necessary to facilitate the proper discharge of its duties and to fix the compensation therefor.

Other provisions of the bill relating to the character of the material out of which the capitol building should be constructed, and the creation of the fund, etc., are unnecessary to be considered in this brief.

The petition also alleges that the legislative law is in violation of that provision of the Enabling Act which prohibits the legislature of the State, except as shall be necessary for the convenient transaction of the public business in the

State at said capital, from appropriating any public moneys of the State for the erection of buildings for capital purposes until the expiration of the time fixed in the Enabling Act, and that by reason of the appointment of the commissioners and the authority given to such commissioners to employ an engineer and architect, clerical help, etc., that an additional expense of not less than Fifty Thousand Dollars ($50,000) per annum for a period of two or more years will be incurred by the State of Oklahoma, and be a direct obligation against the State which much be borne and paid by the plaintiff and other taxpayers of Oklahoma; that such expense so incurred, and the burdens so imposed are in violation of the provisions of said Enabling Act, which provides that the State shall not incur any expenditure for a permanent capitol building prior to 1913, and are also repugnant to the ordinance irrevocable of the Constitutional Convention adopting the terms and provisions of the Enabling Act.

There is also an allegation to the effect that an expenditure for additional rents will be incurred equal to One Hundred Thousand Dollars, caused by attempting at this time to locate the permanent capital of the State, which would not

be incurred except for such permanent location, and that such additional expenditure will also be a burden upon the taxpayers of the State, including the plaintiff, against which said taxpayers are protected by the terms of the Enabling Act.

To this petition the defendants in error filed a demurrer. The cause was argued, submitted and decided upon the petition and demurrer. The court sustained the demurrer to the petition, the plaintiff elected to stand upon the petition and judgment was rendered against the plaintiff dismissing the petition and for costs.

The Supreme Court of the State, in dealing with the question, decided that the legislative act was valid, that the provisions in question of the act of congress were void and denied the prayer of plaintiff in error for injunctional relief. Three of the justices concurred in said opinion; two of them dissented. The opinions of the court and of the dissenting justices are printed in full in the record.

ARGUMENT.

The questions embraced in the assignment of error may be grouped and stated as follows:

1. Does the enabling act and its acceptance by the ordinance irrevocable constitute a binding compact between the State and Nation?

2. Have the people of a territory in the formation of a state the power to temporarily waive a right which the State might, but for such waiver, exercise after the admission of the State?

3. Under the enabling act and the ordinance, has the legislature of Oklahoma the power to permanently locate the capital of the State, or must it be so located by a vote of the people?

4. Has the legislature of the State the power to create an indebtedness at this time for the purpose of locating the permanent seat of government which must be met by a levy of taxes?

We will consider the assignments of error in the order above given.

The enabling act, under which the State was admitted, contains a provision relating to the capital as follows:

> "The capital of said State shall temporarily be at the City of Guthrie, in the present Territory of Oklahoma, and shall not be changed therefrom previous to Anno Domini, nineteen hundred and thirteen, but said capital shall, after said year, be located by the electors of said State at an election to be provided for by the legislature: Provided, However, that the legislature of said State

except as shall be necessary for the convenient transaction of the public business of said State at said capital, shall not appropriate any public moneys of the State for the erection of buildings for capitol purposes during such period."

The enabling act also contains the following:

"Sec. 22. That the constitutional convention provided for herein shall, by ordinance irrevocable, accept the terms and conditions of this act."

The Constitutonal Convention adopted the following ordinance irrevocable:

"Accepting Enabling Act. Be it ordained by the Constitutional Convention for the proposed State of Oklahoma, that said Constitutional Convention do, by this ordinane irrevocable, accept the terms and conditions of an act of congress of the United States, entitled, 'An Act to Enable the People of Oklahoma and the Indian Territory to form a constitution and state government and be admitted into the Union on an equal footing with the original states; and to Enable the People of New Mexico and Arizona to form a constitution and State Government and be admitted into the Union on an equal footing with the original states,' approved June the sixteenth, Anno Domini, Nineteen Hundred and Six."

"I hereby certify that the foregoing ordinance Accepting the Terms and Conditions of the Enabling Act as the same has heretofore been passed and engrossed, was engrossed with the engrossed copy of the constitution on parchment, was read as engrossed and roll call had thereon and the same duly adopted by a majority of the votes of all the delegates elected to and constituting this convention at 11:41 o'clock a. m., this 22nd day of April, Anno Domini, 1907.

"WM. H. MURRAY, President,
"The Constitutional Convention of the
"Proposed State of Oklahoma.
"ATTEST: JOHN McLAIN YOUNG,
"Secretary."

Under the authority of the enabling act, the people of Oklahoma elected delegates for the purpose of framing a constitution and in this grant of authority there was necessarily included the further authority to accept, by ordinance irrevocable, all the provisions of the enabling act, and the delegates to the constitutional convention carrying out the intention of the people did adopt such enabling act.

No agreement, compact or contract could have been more solemnly made or entered into,

It was contended below and decided that the law as enacted and agreed to, by congress upon the one side and the people of Oklahoma upon the other, is a nullity. This we contend was error and submit that the act of congress and ordinance of the Oklahoma constitutional convention constituted a binding compact between the people of the entire United States acting through their duly accredited delegates in congress upon the one side and the people of Oklahoma acting through their duly authorized agents, the delegates to the constitutional convention upon the other. Each side having authority to act, they together formulated a compact, under which the people of Oklahoma should enter, upon terms of equality, the sisterhood of states. Upon the one side, the people of the United States with full power to grant or deny, upon the other, the people of Oklahoma with the right to accept or reject. In short, competent parties upon each side to make a compact and to determine all of its conditions. Sovereign peoples contracting about matters involving their sovereign powers, upon an equal footing with each other relative to the matters involved, neither having the power to coerce or compel, and either being at liberty to accept or reject.

We have then to consider this compact in the light of the facts involved, the status of the parties and the historical and antecedent status of the States of the Union.

It may not be out of place to refer briefly to some of the earlier history of this country leading up to the Union of the States and the adoption of the present constitution, as these historical matters may aid somewhat in determining the powers of congress upon the one side and the people of Oklahoma upon the other, in the making of compacts such as are embodied in the enabling act and ordinance accepting the same.

The articles of federation and the constitution of the United States were the outcome of agreements between first the colonies of the United States and later, the States forming the Union.

This court is, of course, perfectly familiar with the fact that the original colonies were independent of each other, and that until 1774 there was no such general unification of interest as necessitated or brought about a semblance of general government based upon a joinder of the common interest of the colonies; that prior to this time their general governments were not

bound one to another in any manner other than by reason of their common allegiance to England and that their laws were local in their application, and only intended to operate upon the people and property of the colony or province adopting them. The court is also familiar with the events leading up to the calling of the continental congress, and with the struggles of that body and of the people to obviate the difficulties existing between the colonies and England, which finally culminated in the Declaration of Independence of July 4, 1776.

An examination of that instrument will show that the signers thereof styled themselves "The Representatives of the United States of America," and their meeting, a "General Congress." In this meeting or congress were the representatives of the original thirteen colonies. Afterward, and until the articles of federation and perpetual Union were adopted on the 9th day of July, 1778, the continental congress, so-called, was beset with great difficulties in adjusting the differences growing out of religious opinions, commercial interests and everything dependent upon climatic and labor conditions and arising from widely divergent usages, customs and political connections. (Bancroft Vol. 4, Chap. 4.) This first congress met in September, 1774. It was not until 1776, and on July 4th

that they formulated the Decelaration of Independence, and not until July 9th, 1778, that the articles of federation were finally adopted.

We have referred to these historical facts merely to show that each colony was acting as an independent sovereignty, at all times claiming the right to make its own compacts, and that each was offering suggestions looking toward the surrender of some of its attributes of sovereignty in order that a union of the colonies might be perfected.

Under the articles of federation, all disputes between the states respecting boundaries, jurisdiction and other matters were confided to congress for settlement. Thus, in the outset congress was recognized as the proper tribunal to adjust and determine these controversies.

When the present constitution of the United States was adopted, it was apparent that additional states would be created, and by the first clause of Section 3, Article 4, it was provided:

> "Section 3. New states may be admitted by the congress into this Union; but no new state shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned as well as of the congress."

Following this in Section 4, we find:

> "The United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature or of the executive (when the legislature cannot be convened) against domestic violence."

Here then, we have a provision which vests in congress the absolute power to admit new states, and the further provision that the United States shall guarantee to every state in this Union a republican form of government. As to all conditions under which the new state may be admitted, the constitution is silent, except that its government shall be republican in form.

The determination of the question as to whether or not a state shall be admitted or whether or not its government is republican in form is, under the constitution, confided to congress. It is a political question and must be settled by congress, because congress alone is vested, not only with the power to admit, but to congress has been given the authority to guarantee a republican form of government to the state. As the United States in this respect can act through no other authority than congress,

when congress has spoken upon these questions, its decision is final. This seems to be the settled law.

Luther vs. Borden et al., 7 Howard, 1-42

This case arose out of the political differences agitating the people of Rhode Island in 1841 and 1842. It involved a question of the recognition of a government in the State of Rhode Island, and in the opinion appears a discussion which we deem pertinent to the case here under consideration. Referring to Section 4, of Article 4, supra, the Supreme Court of the United States uses this language:

> 'Under this article of the constitution it rests with congress to decide what government is the established one in a state. For as the United States guarantee to each state a republican government, congress must necessarily decide what government is established in the state before it can determine whether it is republican or not. And when the senators and representatives of a state are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority and its decision is binding on every department of the government, and could not be question-

ed in a judicial tribunal. It is true that the contest in this case did not last long enough to bring the matter to this issue; and as no senators or representatives were elected under the authority of the government of which Mr. Dorr was the head, congress was not called upon to decide the controversy. Yet the right to decide is placed there, and not in the courts."

Now why did the Supreme Court hold that congress was vested with this authority? Simply because it has been confided to the United States by the constitution and congress must act for the United States in determining the question.

Martin vs. Mott. 12 Wheaton, 19-31, is a case wherein the president called out the militia to suppress an insurrection in a State. Certain of the officers called upon to act refused, and a court martial resulted. As a defense it was urged that the causes under which the president was authorized, under the constitution, to act, did not exist. The opinion of the Supreme Court was delivered by Mr. Justice Story, and to this contention, he replied:

"The power itself is confided to the executive of the Union, to him who is, by the constitution, 'the commander-in-chief of the militia, when called into the actual service

of the United States,' whose duty it is to 'take care that the laws be faithfully executed,' and whose responsibility for an honest discharge of his official obligations is secured by the highest sanctions. He is necessarily constituted the judge of the existence of the exigency in the first instance, and is bound to act according to his belief of the facts. If he does so act, and decides to call forth the militia, his orders for this purpose are in strict conformity with the provisions of the law; and it would seem to follow as a necessary consequence, that every act done by a subordinate officer, in obedience to such orders, is equally justifiable. The law contemplates that, under such circumstances, power shall be given to carry the orders into effect; and it cannot, therefore, be a correct inference that any other person has a just right to disobey them. The law does not provide for any appeal from the judgment of the president, or for any right in subordinate officers to review his decision, and in effect defeat it. Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts. And, in the present case, we are all of opinion that such is the true construction of the act of 1795.

> It is no answer that such a power may be abused, for there is no power which is not susceptible of abuse. The remedy for this, as well as for all other official misconduct, if it should occur, is to be found in the constitution itself."

In **Wilkes vs. Disman,** 7 Howard, 89-131, the language in **Martin vs. Mott** is quoted with approval, and it is also cited with approval in **Ex parte Vallandigham,** 1 Wallace, 243-254.

In **Oklahoma City vs. Shields,** 22 Oklahoma, 265-300, is contained a very full discussion of the principle of law for which we here contend. There the question arose as to the power of the legislature to exclusively determine whether or not an emergency provision should attach to a law. The court affirmed the power. Why? Because, under the constitution, the power had been conferred on that body to determine the question, and their action in such matter was not reviewable by the couruts. So here, under the constitution of the United States, the matter of determining whether or not our state government is republican in form has been confided exclusively to congress, not to the courts. When congress has, by its enabling act, proposed and this State, assented, it is settled and the courts may not question the constitutionality or power of congress, but can only accept and give effect to that which congress has created.

"The power of congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come into this country, and to have its declared policy in that regard enforced exclusively through its executive officers, without judicial intervention is settled by our previous adjudications."

The Japanese Immigrant Case, 189 U. S. 98.

To the same effect are the following cases:

Dorsheimer vs. United States, 7 Wall, 166.

Rubber Company vs. Goodyear, 9 Wall, 788, 798.

Loo Shee vs. North, 170 Fed., 570.

In **Gibbons vs. Ogden,** 9 Wheaton 1, Chief Justice Marshall discusses the power of congress over interstate commerce. We refer to the language of the opinion found on page 570:

"We are now arrived at the inquiry, what is this power?

"It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power like all others vested in congress is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are

prescribed in the constitution. These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several states, is vested in congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States. The wisdom and the discretion of congress, their identity with the people, and the influence which their constituents possess at elections are, in this, as in many other instances as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments."

"New states may be admitted by the congress into this Union."

This power is absolute. "The United States shall guarantee to every State in this Union a republican form of government." To which department is this power and duty confided. The answer must be "To Congress." Which department of the government must determine whether

or not a state has a republican form of gvoernment? The answer to this question must also be the same. Where power is thus lodged, can the courts nullify or question either the extent of or the manner in which the power shall be exercised? The answer is found in the language of the decision last cited. This decision is in harmony with the letter and spirit of the constitution and of numerous decisions of this court in dealing with the powers of executive officers, boards and other bodies to whom have been confided the determination of specific questions. The power of congress to determine whether or not a state has adopted a republican form of government being exclusive, the question then arises: How is the matter of the deterimnation of what is a republican form of government involved in this case?"

The answer to this question is, in our judgment, plain and apparent. The constitution of the United States requires that congress shall guarantee to each state a republican form of government. Congress, through the president, its delegated agent, determined when Oklahoma was admitted into the Union, that the "Constitution, articles, propositions and ordinances" which were required to be submitted to the president, did give to this state a republican form of

government. The power to make that determination being vested wholly in congress, its determination that the government formed by the constitution, ordinances, etc., including the ordinance irrevocable, was republican in form, was final and binding upon this and every other court. Now how does that determination relate to the case at bar Obviously the ordinance irrevocable and the legislative act referred to above cannot stand together. One must be void. Appellee's claim of validity for the legislative act upon the ground that the ordinance is void. And why void? Because they say, it attempted to do a thing which was beyond the power of the State to do, it attempted to strip the state of some of its powers of sovereignty, it attempted to give Oklahoma an unrepublican form of government because, they contend, Oklahoma cannot exercise now all the functions of the other states of the Union guaranteed to each by the constitution. Under our scheme of government a state may possess a republican form only when it has a representative government, embracing the three great branches, and possessed of those functions of sovereignty which are exercised by the original and other states. This distinction between "possession" and "exercise" of the powers of sovereignty we will advert to further

on. The point we desire to impress here is that congress when it determined that the form of government which Oklahoma offered was republican in form, decided that the governmnet formed by the instruments submitted did not strip the state of any of its essential attributes of sovereignty; congress by that determination decided every contention of appellees in this case against them, and congress being vested by the constitution with the sole power of deciding upon those questions, its decision was final and beyond the power of any court to question. This does not mean that Oklahoma might not have formed a constitution materially different from the one presented and still have had a republican form of government. It does not mean that Oklahoma may not now change its form of government and still have one valid and republican in form, but it does mean that the constitution and ordinances which the state did offer were valid, that they did give a republican form of government and that they did not strip the state of any essential attribute of sovereignty, and if that constitution and that ordinance, coupled with it were valid and did give such a republican form of government as is contemplated by the constitution of the United States, then they are valid today; the state did not attempt to do :

thing beyond its power, and every contention of appellee, together with the legislative act, falls to the ground before the immutable law of contracts and good faith.

This is the queston which we say congress had a right to and did determine. This is the determination beyond which we contend neither this nor any other court has a right to go, and if we are correct, then the very foundation stone upon which, only, the appellee's can base the validity of their bill, to-wit: the invalidity of the ordinance irrevocable, crumbles away into dust.

This then is the relation of the determination of the question of a republican form of government to the case at bar. As before stated the ordinance and the legislative bill cannot stand together. Congress, having a right so to do, has determined that the ordinance does not trespass upon the rights and powers of the state, and is therefore valid. That determination, under the decisions of the highest court of the land —quoted in our brief, is and must be final. The inevitable result is that the legislative act must fall.

It was decided by the Supreme Court of Oklahoma, however, that the provisions of the enabling act in question were beyond the power of

congress to enact or the state to accept and we shall now refer to the discussions bearing directly upon that point. In **Martin vs. Hunter,** 1 Wheaton, 304, it was said:

> "The powers of the constitution are expressed in general terms, leaving to the legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mold and model the exercise of its powers as its own wisdom and the public interests shall require."

Prigg vs. Pennsylvania, 16 Pet. 539:

> "Congress has, on various occasions, exercised powers which were necessary and proper as means to carry into effect rights expressly given and duties expressly enjoined by the constitution. The end being required, it has been deemed a just and necessary implication that the means to accomplish it are given also, or, in other words, that the power flows as a necessary means to accomplish the end."

From the beginning, it is apparent from the reading of the history of the early union of the states that each claimed and exercised the right to make their own compacts, surrendering as much or little of their sovereignty to the general government as in their judgment seemed to them proper, and in delegating to congress the power

to admit new states, only stipulated that congress should guarantee to each of them a republican form of government.

The people of Oklahoma, under the enabling act, secured a republican form of government.

State vs. Harris, (S. C.) 2 Bailey, 598, 599:

> "A republic is a government for the protection of the citizens against the exercise of all unjust power. It is a government administered by a few, as the representatives of the people and for their benefit. With this as the cardinal object of the state government, it has no privileges, except such as are conferred on it by the constitution, by act of the legislature, or such as are necessary for the due administration of the government."

Under the contention of the learned counsel for appellee, each state would necessarily be required to have the same character of enabling act, that is to say, if the limitations and restrictions differed, then the states would not be admitted upon an equality with the other states consequently such limitations and restrictions would be nugatory. For the purpose of ascertaining whether or not the enabling acts of the

various states are the same in their restrictions and limitations, it is well to examine a few of them.

In the State of Arkansas, we find various provisions which are not in any respect similar to those of the State of Oklahoma. We find that congress has reserved from sale certain Salt Springs, together with adjacent lands; that it is further provided that the lands granted for military services shall not be taxable for three years after the government has parted with its title. We also find that the first enabling act for Arkansas was not acceptable to the people, and that congress passed a supplemental or modified act and provided for its acceptance by ordinance irrevocable by the legislature of the state, which was done, and thus Arkansas was admitted into the Union.

We find that in Alabama 5 per centum of the net proceeds of the sale of public lands must be devoted to the building of public highways; three-fifths of said amount to be used as the legislature of the state shall provide, upon highways within the state; two-fifths of such sum to be expended by congress on roads leading into the State, and that no taxes should be levied upon public lands sold for the period of five years after their disposition.

In Louisiana, the provision for five per cent of the proceeds of lands sold is also incorporated, but the state legislature is permitted to expend all of the sum so received upon roads within the state. We also find that the Mississippi river and navigable waters leading into the same shall be common highways and forever free. This last named provision does not exist in all of the enabling acts where they have navigable waters, and does not appear in the articles of federation nor in the present constitution of the United States. There is a further provision in the enabling act for Louisiana which does not appear in the like acts for other states, which is to the effect that all laws and judicial proceedings of the courts of the state shall be published in the English language.

In Missouri also, there is a provision to the effect that 5 per cent of the net proceeds of lands sold by congress should be reserved for making public roads and canals; three-fifths to be applied to objects within the state, under the direction of the legislature, and two-fifths to be applied by congress on roads and canals outside of the state, leading into the state. Another peculiar provision was discussed and debated at some length relative to the restriction upon slavery. As to this, Mr. Justice Story, in his

great work on the Constitution, Vol. 2, Section 1321, says:

> "At the time when the preliminary measures were taken for the admission of the State of Missouri into the Union, an attempt was made to include a restriction prohibiting the introduction of slavery into that State, as a condition of the admission. On that occasion the question was largely discussed, whether congress had constitutional authority to impose such a restriction upon the ground that the prescribing of such a condition is inconsistent with the sovereignty of the State to be admitted, and its equality with the other states. The final result of the vote which authorized the erection of that state seems to establish the rightful authority of congress to impose such restriction, although it was not then applied. In the act passed for this purpose, there is an express clause, that in all the territory ceded by France to the United States under the name of Louisiana which lies north of 36 degrees 30 min. N. Lat. not included within the limits of the State of Missouri, slavery and involuntary servitude otherwise than in the punishment of crimes, whereof the parties shall have been duly convicted, shall be, and is hereby forever prohibited. An objection of a similar character was taken to the compact between Vir-

ginia and Kentucky, upon the ground that it was a restriction upon state sovereignty. But the Supreme Court had no hesitation in overruling it, considering it as opposed by the theory of all free governments, and especially of those which constitute the American Republic."

In California, the people prepared and presented a constitution and congress admitted the state upon such constitution, with express provisions limiting the powers of the people under their constitution.

In Mississippi there was also a provision limiting the right of taxation on public lands, and a further provision that a certain per cent of the net proceeds of public lands sold should be used for public highways, a part of which was to be used within the state, under the direction of the legislature and a part to be used outside of the state, under the direction of congress.

In Michigan 5 per cent of the net proceeds of the sales of public lands was to be used for public roads entirely under the supervision of the state legislature, in this differing from the right given to Alabama, Mississippi, Louisana, Arkansas and Missouri. Michigan was also permitted to handle all of her salt springs and ad-

jacent lands for her own use and benefit, thus differing from Arkansas and some of the other states in this respect.

In the Utah enabling act, we find a provision against plural marriages which does not appear in many of the enabling acts.

In Nebraska there was a controversy of rather an unusual character. It seems that the people of the Territory of Nebraska, or some persons acting for them, prepared and presented to congress a constitution for their state. Congress passed a law providing that if the people should adopt the constitution they should then be admitted into the Union upon an equality with the other states. This constitution was, at the first election, voted down. Afterward, at a subsequent election, the people voted to adopt it, and it was transmitted to congress for inspection. Congress accepted the same, subject, however, to a condition that the word "white" should be stricken out of the constitution at the place wherein it provided "all free white persons should be entitled to vote, etc." Congress further provided that if the legislative body of the state should adopt the provision on behalf of the people of the state, then the state should be admitted into the Union upon an equal footing with the other states.

The legislature of the state, in conformity with the requirements upon the part of congress, passed an act which was as follows:

> "Be it enacted by the legislature of the State of Nebraska that the Act of Congress of the United States, entitled 'An Act for the Admission of the State of Nebraska into the Union," passed February 9, 1867, be, and the same is hereby ratified and accepted. It is hereby declared that the provisions of the third section of the Act of Congress shall be a part of the original law of the State of Nebraska."

This action having been certified to the president, a proclamation was issued by him admitting the state into the Union on an equality with the other states.

In **Brittle vs. The People,** 2 Neb., 198, the question arose as to the binding effect of a fundamental law adopted by the legislature without submitting the question to the people. In the opinion of the court, which is very exhaustive, it is held that when a constitution has been adopted by the people of a territory preparatory to admission into statehood, and congress prescribes certain changes and additions to be adopted by the legislature as part of the constitution and such changes and additions are declared to be fundamental conditions of the ad-

mission of the state, and the legislature accepts such changes, admissions and conditions, and the state is thus admitted, they become thereby a part of the constitution and binding as such, although not submitted to the people for their approval.

While there was a dissenting opinion filed in the case, yet the dissenting opinion only goes so far as to hold that the legislature of the state may not bind the people to a change of a constitution theretofore adopted by the vote of the people, both the majority and dissenting opinions seeming to concede that where the people themselves, acting in their sovereign capacity, make the compact, no question can arise as to its binding force and validity. In the dissenting opinion, we find it stated that that is the first time where a legislative body was called upon to act in behalf of the people without the approval of a vote by the electors of the state, and it is stated further that the action of congress in calling upon the legislature and being content to accept such action by the legislature, was departing from the rule which had been universal in its application theretofore.

This, however, does not appear to be a correct statement, as an examination will show that in several instances, notably Kansas, congress

did require the legislative bodies to adopt conditions as fundamental laws of the state as a condition precedent to their admission. We will refer to the case of **Brittle vs. The People** further on in this discussion as it is an interesting and valuable case.

From an examination of the enabling acts which may be found in Thorpe's American Charters and Constitutions, in volumes 1 to 7 inclusive, it will appear that enabling acts differ in many essentials, that the local conditions of the proposed new states have always been given consideration, and that congress has always undertaken to frame enabling acts so as to best meet the necessities of the proposed new states. In some of the new states a per centum of the net receipts from the sales of the public lands for the building of roads was given; in many cases 5 per cent; in certain instances the money was all turned over to be handled by the state legislatures; in other cases the state legislature was given two-thirds or three-fifths of such sum, the other one-third or two-fifths was used by congress in building roads and canals outside of the state which lead into the state, thus discriminating between the states. In some states, lands sold by the government were not taxable for a period of five years after the sale, in others only

such lands as were located by military scrip or land warrants issued on account of military service, were so exempted, while in many no restrictions whatever were placed upon the state touching the taxation of lands after the same were sold by the government. These inequalities with relation to the taxing powers of the new state were, by agreement, acquiesced in by the states, and the right of congress to limit the taxing powers of the new states appears never to have been questioned. Yet in respect to these matters, the new states were not on an equality with the original states.

There is a provision in the enabling act of Louisiana requiring all laws and judicial proceedngs to be published in the English language. This provision was inserted to meet a local condition and was not placed in any other enabling act, until the passage of the act relating to the admission of Arizona and New Mexico.

In all of the new states, lands are given for public schools, but in varying amounts. Many were given lands for public buildings, but some were given in addition to lands, a certain per cent of the sales of public lands, for educational purposes. But there does not appear to have been any purpose in the mind of congress to place the new states upon an exact equality with,

reference to grants of lands for the various purposes named, nor with reference to the right of taxation of lands after the government had parted with its title thereto, nor does it appear that congress intended to or did place the new states upon an equality with the original states in these and many other respects.

We are aware of the fact that the learned counsel for appellee will cite an excerpt from Tucker on the constitution, but as against that, we place with confidence the statement and conclusion arrived at by Mr. Justice Story, and we believe when we take in to account as a primary phase of the case, the power of congress in the admission of states and the further authority, which congress alone possesses, to guarantee to the states a republican form of government, that Mr. Story and not Mr. Tucker is right in his conclusions. All that seems to be necessary in any case is for the people themselves to assent to the limitation.

In the original states, as well as in some admitted after the confederation, there is no prohibition against taxing lands and property of non-residents at a higher rate than the lands and property of residents. In the new states, as far as we have searched, we have found such prohibitions a part of the enabling acts and the

same have been accepted by such new states.

In some of the later enabling acts, we find a prohibition prohibiting polygamous marriages. This was brought about by the practice of the Church of Latter Day Saints, commonly known as Mormons. In the enabling act of Utah, we also find that congress has, by land donations, made provisions for the establishment of permanent water reservoirs for irrigating purposes. This provision is one which is deemed essential by congress for some of the states.

Enough, we think, will be found even upon a casual reading of the various enabling acts under which new states have been admitted to show that it was not the purpose of congress to place each state upon an exact equality with the original states or the other states of the Union, that wherever local conditions differed, such differing conditions were met by provisions best suited to the occasion; that different restrictions which, in the judgment of congress, were necessary for the good order or welfare of the people of a proposed new state, were, by congress, offered in the enabling act and when acquiesced in by the people of the new state, such restrictions have, until the decision in the case at bar, been uniformly respected.

This is in accordance with the grant of power to congress by the constitution, and there is nothing in that instrument which in any manner conflicts with this power. Nothing appears therein which requiures the new states to be admitted upon an equality with each other or with the original states. The time, manner and conditions under which states may be admitted is left with congress, and it is for congress alone to determine these matters. It is true that congress has, in the enabling act, said to the people of Oklahoma, "Accept the conditions which we offer, and you shall be admitted upon an equality with the other states," but this equality must not be construed to mean that upon its admission, Oklahoma shall in all respects, possess the same kind of a government with the same kind of powers which obtains in other states or in the original thirteen states. This is not what is meant by the term "equality." For a complete statement of just what is meant by this term and how it shall be applied we refer to the opinion of Mr. Justice McClain, one of the most eminent jurists of his time, in the celebrated case of **Spooner vs. McConnell, et al.**, 1 McClain, 337.

In the syllabus, it is said:

"Compacts are as obligatory upon states as upon individuals. And the fact of their entering into compacts, which bind them, shows that they are free."

In the opinion, it is said:

"The people of the state formed the constitution, and it was sanctioned by congress; so that there was the 'common consent,' required by the compact to alter or annul it. But in regard to the great question in this case, as to the navigable waters, the state constitution purports to make no alteration; and if the ordinance in this part be annulled, it must be done by implication, and on this ground the motion for an injunction is resisted. It is insisted that if effect be given to this provision of the ordinance it is restrictive of the sovereign power of the state; and is repugnant not only to the constitution of the state and the constitution of the United States, but to the act of congress which declares that the state of Ohio shall be admitted into the Union, on an equal footing with the original states. If this position be correct, it must be fatal to the plaintiff's right."

* * *

"It is a well established principle, that no political change in a government, annuls a compact made with another sovereign power or with individuals. The compact is

protected by that sacred regard for plighted faith, which should be cherished alike by individuals and organized communities. A disregard of this great principle would reject all the lights and advantages of civilization and throw us back on the age of vandalism. This compact was formed between political communities and the future inhabitants of a rising territory, and the states which should be formed within it. And all who became inhabitants of the territory made themselves parties to the compact. And this compact so formed could only be rescinded, by the common assent of those who were parties to it. When application was made to congress by the people of the eastern part of the territory, to authorize the call of a convention to form a constitution, modifications of certain provisions of the compact were proposed, some of which were embodied in the constitution subsequently formed, and others of them after various alterations, were also inserted."

* * *

"The state has been admitted into the Union on an equal footing with the original states. And yet the state is bound by compact not to tax the lands of the United States, nor until the expiration of five years after they shall have been sold. The power to tax is an incident to sovereignty. Does

this exemption take away or lessen this power. If it does, in the sense contended, then the state of Ohio was not admitted into the Union, with the same powers of sovereignty as the original states. This consequence is not obviated by the fact, that this was a restriction imposed, with the consent of the state, for an equivalent. If it can be an abridgment of the sovereign power of the state, the objection stands in its full force. The compact not to tax was the voluntary act of the people of the state, but not more so than was the compact by the same people that the navigable waters should be common highways. And this exemption from taxation is as much a restriction on the exercise of the sovereign power, as the exemption of the navigable streams from obstruction by the same power. The right to authorize works on a navigable stream, which may, to some extent, obstruct its navigation by the sovereign power of the state, is not less clear, on general principles, than the right to tax. By compact with the federal government, the national road, that lies within the state, is to be kept in repair by tolls imposed by the state for that purpose. The state cannot, under this compact, vacate this road, as it may all public roads established by its authority; and does this compact abridge the sovereignty of the state?

"By the eighth article of the treaty of peace made with great Britain, in 1783, the 'Navigation of the river Mississippi from its source to the ocean,' it is declared 'shall forever remain free and open to the subjects of Great Britain and the citizens of the United States.' A part of this river was within the established boundary of the United States, and did this compact abridge the sovereignty of the Union? * * *

"Individuals are free to do that which may be done lawfully, but by a compact they may stipulate that they will not do certain things, and does this destroy their agency? On the contrary, does not the obligation of the compact or agreement voluntarily formed, show their power and regulate their rights? The same may be done under certain restrictions, by the people of a state. The terms, "sovereign power of the state" are often used, without any very definite idea of their meaning, and they are often misapplied. Prior to the formation of the federal constitution, the states were sovereign in the absolute sense of the term. They had established a certain agency, under the articles of confederation, but this agency had little or no power beyond that of recommending to the states, the adoption of certain measures. It could not be properly denominated a government, as it did not possess the power of carrying its acts into

effect. The people of the states, by the adoption of the federal constitution, imposed certain limitations in the exercise of hteir powers which appertain to sovereignty. But the states are still sovereign. They are bound by the compact not to exercise certain powers which they have delegated to the federal government, and citizens of the state are bound to respect and obey the powers thus delegated. But this compact or federal constitution, was voluntarily formed by the people of the states, in their sovereign capacity, and may be changed, at their pleasure, in the mode provided."

* * *

"If the people of a state, in their sovereign capacity, enter into a compact, either from motives of sound policy or for a valuable consideration paid, that certain lands within the state shall be exempt from taxation, or that certain navigable rivers shall remain unobstructed, the sovereignty of the state is no more affected, than it is by every act of incorporation, where exclusive privileges are given to a company or an individual. Certain objects on which the sovereign power may act are, by its own consent, withdrawn from its action; but this does not divest the state of any attribute of its sovereignty. If certain lands be exempt from taxation, the general power to tax is not

affected; and so as to any exclusive right or privilege which is vested by compact or act of incorporation. A state cannot divest itself of its essential attributes of sovereignty. It cannot enter into a compact not to exercise its legislative and judicial functions, or its elective rights; because this would be to change the form of government which is guaranteed by the federal constitution. But it is earnestly contended that the rights asserted by the complainant, are wholly incompatible with the sovereignty of the state, and with the provision that the state was admitted on an equal footing with the original states. Does this provision mean, that the new state shall exercise the same powers and in the same modes, as are exercised by any other state. Now this cannot be the true construction of the provision, for there cannot be found, perhaps, any two states in the Union whose legislative, judicial and executive powers are in every respect alike. If the argument be sound, that there is no equal footing short of exact equality in this respect, then the states are not equal. **But if the meaning be, that the people of the new state exercising the sovereign powers which belong to the people of any other state, shall be admitted into the Union, subject to such provisions in their fundamental law as they shall have sanctioned; within the restrictions of the federal**

constitution, then the states are equal. Equal in rank, equal in their powers of sovereignty; and only differ in their restrictions, which, in the exercise of those powers, they may have voluntarily imposed upon themselves. Thus a state may, in her constitution, prohibit the legislature from incorporating banks, or in fact from passing any act of incorporation; and yet this state would be admitted into the Union on an equal footing with the other states. The same powers were exercised in forming a constitution, but in the distribution of the powers of the state government they were not given to the same extent, nor were they to be exercised in the same manner. But this produces no inequality. The states are equal, inasmuch as each has, by its own voluntary will established its own government, and has the power to alter it. This is the principle on which the state governments are established, and consequently they all stand upon an equal footing. They have the same basis; have been formed according to the will of the people, and may be changed at their discretion. If then, there is nothing in the constitution of the state which is repugnant to the compact in the ordinance in relation to navigable waters, and the parties to the compact have in no form annulled it, and it is not inconsistent with that equality which the state of Ohio claims with the

original states, it follows that this compact is in full force, and is a subject of judicial cognizance.

"The sixth article of the compact prohibits slavery. The constitution of the state also prohibits it. Now notwithstanding this inhibition n the constitution, the people of the state in convention, might so alter the constitution as to admit slavery. But does not the compact prevent such an alteration without the consent of the original states? If this be not the effect of the compact, its import has been misconceived by the people of the state generally. They have looked upon this provision as a security against the introduction of slavery, even beyond the provisions of the constitution. And this consideration has drawn masses of population to our state, who now repose under all the guaranties which are given on this subject by the constitution and the compact. The provision of the compact in regard to slavery rests upon the same basis as that which regards the navigable waters within the state. They are both declared to be unalterable, except by common consent."

In the opinion of United States District Judge Leavitt, which was also filed in the same case, we find language which in its reason and logic also supports the theory for which we contend:

"Looking at this subject in this light, it is not perceived that the recognition of the obligatory character of the provision of the ordinance, under consideration, so far detracts from the rights of sovereignty, in Ohio, as to warrant the conclusion, that she is not sovereign, in any just sense of that term. To entitle a state to that character, it is not regarded as essential, that she should possess, in an equal degree, the same powers, over all subjects, that may be possessed by other states. In any other aspect of this subject, no one of the states formed within the territory northwest of the river Ohio, has been admitted into the Union, on a footing of equality with some of the original states. The institution of slavery existed in many of the original states, at the period of the adoption of the ordinance of '87; and, in several of them, it continues to exist. Yet, the ordinance expressly inhibits the introduction of slavery in any of the states to be formed within the territory; and these states have made this provision of the ordinance a part of their constitution. In this case then, it is clear, that some of the original states possess rights, and exercise a species of jurisdiction, which is prohibited to Ohio, and other states. And yet, can it be maintained that the latter states are not equally sovereign with the former?"

In the opinion of Judge Leavitt, following the language above quoted, we think it completely and conclusively appears that the term "equality" as used in the enabling act cannot mean what is contended for by counsel for appellee.

> "Contemporary interpretation of the constitution practiced and acquiesced in for years conclusively fixes its construction." Stuart vs. Laird, 1 Cranch, 299, Martin vs. Hunter, 1 Wheaton, 304; West River Bridge Co. vs. Dix, 6 Howard, 507; Burrow vs. Giles Litho. Co., vs. Saxony, 111 U. S. 53; Pollock vs. Bridgeport, S. B. Co., 14 U. S. 411.)

For more than a century, congress has been, at various times, engaged in framing enabling acts for new states. These acts have been acquiesced in and accepted, without question, by the people for whose good they were enacted. During the period mentioned, the congress of the United States has had at all times as a part of its membership some of the greatest lawyers the country has ever produced, many of whom have, after serving their country in that body, adorned the highest judicial positions under our government, and have honored the profession with their matchless skill as lawyers. Some of the greatest statesmen the world has ever known have also given to the congress of the United

States the benefit of their knowledge and study of the constitution in the framing of these various enabling acts. These jurists, statesmen and lawyers for over one hundred years have been placing the construction upon the constitution for which we here contend, have been repeatedly passing enabling acts and defining the extent of the legislative powers of new states and the construction placed upon the powers of congress in these respects has until the decision of the Supreme Court of Oklahoma been uniformly upheld and hardly questioned, and the legislative power of this state cannot now question the right of congress. If the legislative power can annul this provisions, it can with equal right do away with the provisions relating to perpeft toleration of religious beliefs, plural marriages, taxation of the lands of non-resident citizens of other states at a higher rate than that of citizens of this state, the assumption of the debts of Oklahoma, the manufacture and sale of intoxicating liquors in certain parts of the state for the period named in the enabling act. In short, in its last analysis it would make of an enabling act a useless thing except to th eextent of admitting the new state, and would demonstrate the fact that for more than one hundred years congress has been acting without authority in

these matters. This cannot be the law. The same right of the people of the state to be an independent sovereignty carries with it the right to make compacts or agreements with relation to the exercise of this sovereignty. This, we think, is fully demonstrated by the logic and argument of the learned jurists in Spooner vs. McConnell, et al., supra.

In the case of Hogg vs. Zanesville Canal & Manufacturing Co., 5 Ohio, 416, the point was before the court as to the effect to be given to an irrevocable condition precedent to admission as a state. The enabling act of the state of Ohio was adopted by ordinance irrevocable the same as certain conditions named in the enabling act were adopted by the people of Oklahoma, and it was suggested in that case, as in this, that it being no part of the constitution, the people of the state might change it, and in response to this, the court said:

> "That this portion of the ordinance of 1787, is as much obligatory upon the state of Ohio, as our own constitution. In truth it is more so; for the constitution may be altered by the people of the state, while this cannot be altered without the assent, both of the people of this state, and of the United States, through their representatives. It is an article of compact, and until we as-

sume the principle, that the sovereign power of a state is not bound by compact, this clause must be considered obligatory."

There is another view to take of this case, which, in our judgment, is also fatal to the contention of appellees. At the time congress passed the law in question, this was a territory. Congress had the unquestioned right at that time to deal with the matter involved. (Church of Jesus Christ, or Latter Day Saints vs. United States, 136 U. S., 1; 5 Digest 5585:

> "The United States has supreme sovereignty over a territory, and congress has full and complete legislative authority over its people and government."
>
> "The United States has the entire dominion and sovereignty over all the territories." Shively vs. Bowlby, 152 U. S. 1.
>
> "Congress has full power of legislation over the inhabitants of a territory, unless the law deprives them of some property or vested right or personal liberty without due process of law." Thompson vs. Utah, 170 U. S. 343.

Of course, this principle will be conceded, and such being the law it follows, that at the date when congress provided that the capital should remain at Guthrie until Nineteen Hundred and Thirteen, the act was valid, and congress, at a

time when it had the right to enact the measure having passed the law, it must have then gone into effect, and could only be repealed by the power which enacted it. Has congress repealed the law, by that provision of the enabling act which permitted the state to become a part of the Union upon an equal footing with the other states? It will not be claimed that a repeal was intended, and if repealed, it must be by implication. Repeals by implication are not favored, and to get the intention of a statute and give it proper effect, all parts thereof must be considered. When this well known rule is given effect, what do we find? Congress intended to give to the people of Oklahoma an opportunity to secure statehood. That was the central idea. Congress thought the people were prepared for statehood, provided certain matters were so arranged as to protect against certain local conditions, which congress thought the people were as yet not ready to deal with. Certain matters relative to the liquor traffic and the location of the state capital, plural marriages, taxation, toleration in religious beliefs, etc. As to some of these matters congress thought it not incompatible with a republican form of government to forever prevent the state from dealing as a sovereignty with these matters. In others, notably,

the liquor traffic and state capital location, congress thought that temporarily only the sovereignty of the state should not be permitted full authority.

Now this was evidently the opinion of congress, or it would not have enacted the legislation. Whether or not it was granting to the state a republican form of government, being a matter, which, under the constitution, congress must determine, it necessarily follows, that the conclusion reached by congress was final and as said by the Supreme Court in Martin vs. Mott, 12 Wheaton, supra.:

> "Whenever a statute gives a discretionary power to any person to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of these facts."

And applying that principle here, we find that congress, having the authority to determine whether or not the temporary location of the capital should be at Guthrie or that the liquor traffic should not be permitted in some portions of the state for a period of time, such authority having been exercised within the discretion authorized by the law, the determination of congress must of necessity be binding upon the courts. Particularly is this true when we find that the people of Oklahoma, by an ordinance

irrevocable, in response to the action of congress in this respect, have said that they did accept these terms and did surrender their right of sovereignty temporarily in the several respects mentioned.

No where in this is found support for an argument that by admitting the state on an equal footing with the other states congress repealed the law relating to the location of the state capital, and yet such contention must obtain or the case of appellee falls to the ground. This proposition is not met by the statement that other states have the right to locate their state capital at will. To admit this as sound, you would also concede that other states when other restrictions were imposed would have the right to violate such restrictions. Thus other states as well as our own might ignore the restrictions relating to the taxation of the lands of citizens of other states. Many states could ignore the restrictions which prevent the taxation of lands within the period of five years after they have been disposed of by the government; others might ignore those relating to navigable waters, plural marriages, taxation of Indian lands, in short all of those wholesome restraints which in the judgment of congress were essential or proper in the admission of new states would become nugatory.

The great jurist who wrote the opinion in Spooner vs. McConnell, supra, was right in his definition of what is meant by the term "equality," which is found in most but not all of the enabling acts and whether it be so found or not, it is a matter of not very much importance, as the measure of the state's sovereignty is gauged by the limitations placed thereon by the compact between the people of the United States, acting through its congress, and the people of the state acting through the delegates to their constitutional convention, as outlined in their written compacts.

We now propose to deal with some of the cases in which the question has arisen touching the effect to be given to compacts between the United States and state governments, and to those compacts which have been entered into between the states. So far as we have been able to discover, there is not a case in the books which denies to a state the right to waive its sovereignty in respect to matters here under consideration.

One of the leading cases, to which we heretofore referred (Spooner vs. McConnell, et al., 1 McClain, 337 Federal Cases 13,245), is a case growing out of a controversy with reference to the ordinance of 1787, which provides that the

navigable waters leading to the Mississippi, St. Lawrence, etc., shall be common highways and forever free to the inhabitants of territory and to the citizens of the United States, etc. Spooner, a citizen of Massachusetts, the proprietor of a tract of eighty acres of land situated at the head of the rapids above the Maumee Bay, instituted a bill in equity to enjoin the Canal Commissioners from the construction of a canal, under an act passed by the Ohio legislature, upon the claim that the work of the Canal Commission would destroy the navigation along his property on the Maumee river, and based his claim upon the compact of the ordinance of 1787.

In passing upon the question, the court held that inasmuch as the people of the State of Ohio had formed their constitution which was sanctioned by congress, that whatever appeared in the constitution of the state which was antagonistic to the ordinance had been annulled because of the fact that the parties to the original contract had by common consent, altered and annulled it. We have already quoted very largely from the case and will content ourselves with asking a very careful consideration of the opinion in the case by Mr. Justice McClain, as well as the opinion written by Judge Leavitt. This case answers, we think, very completely all of

the arguments advanced in the majority opinion of the court below. It asserts with absolute confidence that proposed new states may, in their sovereign capacity, yield some of their rights, both legislative, executive and judicial, and so long as the yielding of such rights does not impair the general power which is granted to the states, compacts entered into between an incoming state and congress must be respected and upheld by the courts. In both of the opinions is also discussed at great length, the meaning of the term "equality" with other states as applied to a new state. The definition is so complete that it would seem hardly necessary to enlarge upon the matter and particularly is this true in view of the fact that subsequent decisions refer to and adopt the meaning as expressed in the decisions, and the definition so outlined is in harmony with what must be the law in view of the action of congress since these states have come into the Union.

Bennett vs. Boggs, U. S. Circuit Court, 3 Federal Cases, page 221, case No. 1,319, deals with a compact between New Jersey and Pennsylvania and sustains a compact between those two states which prevented one of the states from exercising all of the usual powers incident to sovereignty in a state.

Vaugh vs. Williams, 3 McClain, 530, Federal Cases, Case No. 16,903. In this case the same circuit justice had under consideration a question growing out of the ordinance of 1787 which arose in Indiana. It related to the right of a person to require the state of Indiana to surrender fugitive slaves and is illuminating upon the question of what is meant by these compacts between the state and the general government.

The syllabus of the case is as follows:

> "A repugnancy between the compact in the ordinance of 1787, and the constitution, (referring to the constitution of the State of Indiana), necessarily repeals the ordinance.
>
> "Indiana, by coming into the Union under the constitution consents to this and the other party to the compact consents by receiving the state into the Union. This is the common consent required by the ordinance to annul it in part or wholly."

It was assumed in the argument of the case that Indiana had not consented to the repeal of the ordinance of 1787 for the government of the Northwest Territory, which provided that slavery should not exist within the territory, but it was laid down in the opinion that the consent of the parties to the compact annulling that provision had been made by the assent of con-

gress to the constitution of the State of Indiana and the opinion holds that but for such consent the compact upon the part of Indiana would be binding thereby, holding that compacts, of a nature such as that under consideration in the instant case are absolutely binding until abrogated by consent of the parties to such compact.

The State of Minnesota vs. Bachelder, 1 Wall. 109, 114, opinion by Mr. Justice Nelson:

> "It is not important to inquire as to the power of congress to pass this law independently of any application from the territorial legislatuure, as the assent of the people through their convention, by coming into the Union as a state, upon the terms proposed, must be regarded as binding the state."

The above quotation is the statement of a rule of law applicable to all provisions in the enabling act of the State of Minnesota and its binding effect upon the state. It is laid down simply as a proposition of law about which there can be no ground for dispute.

Virginia vs. West Virginia, 11 Wall. 39, in the syllabus:

> "The ordinance of the organic convention of the commonwealth of Virginia, under which the State of West Virginia was organized, and the act of May 13th, 1862,

of said commonwealth, constitute a proposition of the former state that the counties of Jefferson and Berkeley and others might, on certain conditions, become part of the new state; and the provisions of the constitution of the new state concerning those counties are an acceptance of that proposition.

"The act of congress admitting the State of West Virginia into the Union at the requeust of the Commonwealth of Virginia, with the provisions for the transfer of those counties in the constitution of the new state, and in the acts of the Virginia legislature, is an implied consent to the agreement of those states on that subject."

Duke vs. Catawba Navigation Co., 10 Ala. 82, 44 Am. Dec. 472, from the syllabus:

"The ordinance appended to the constitution of Alabama is revocable either entirely or pro tanto by an agreement between the state government and the United States; and the powers therein disclaimed may upon the assent of the constituted authorities of the United States and of the state being given, be resumed and immediately exercised by the state authorities under the general powers.

From the opinion:

"We think the argument that the ordinance appended to our constitution is a part of that instrument, and can only be abrogated and annulled in the same manner as any other part, can not be sustained. By the constitution, the powers of the state government are restricted in the particular matters covered by it, and the ordinance is the declaration by the people that certain general powers, otherwise appertaining to the state as a sovereignty, shall not be exercised in particular cases. It provides also, that the disclaimer shall be irrevocable without the consent of the United States. The state government being invested with the entire authority of the people, except where they have chosen to restrict the government, it follows that all the external relations of the people with the officers or with the government of the United States, must be conducted by the state government. The ordinance itself indicates that it is revocable with the consent of the United States, and as the consent of the people of this state can only be expressed through the state government, it follows, that when the assent of both is given by the constituted authorities of each, the powers disclaimed may be resumed and immediately exercised, by the state authorities, under the general powers, these not being restricted otherwise than by the ordinance."

Here is the statement of the principle for which we are contending, decided in 1846 by a state which certainly never intended up to that date to surrender any rights to the general government which the state itself might properly exercise; but the learned court, recognizing the power which had been surrendered by the state to congress and the binding force of the compact between the two sovereigns, found no difficulty in holding that the consent of both the state and the federal government was necessary in order that the compact might be set aside. This is exactly the contention of appellant in this case. Nor is a contention tenable that the conditions of the enabling act were forced upon the people of Oklahoma by congress.

Referring to that matter, and upon this question we call attention to White vs. Hart, 80 U. S., 13 Wall., 646, the syllabus of which reads in part:

> "The constitution adopted by Georgia A. D., 1866, by which it was provided that 'No court or officer shall have nor shall the general assembly give, jurisdiction to try, or give judgment on, or enforce any debt, the consideration of which was a slave, or the hire thereof,' is to be regarded by the court as voluntarily adopted by the state

named, and not as adopted under any dictation and coercion of congress. Congress having received and recognized the said constitution as the voluntary and valid offering of the State of Georgia, this court is concluded by such action of the political department of the government."

Again in Marsh, et al. vs. Burroughs, et al., 1 Woods 463, Federal Case No. 9, 112, from the syllabus:

"The fact that when the state of Georgia applied for readmission to the Union, under the constitution of 1868, congress imposed certain conditions, does not make that constitution an act of congress, or tantamount to such an act."

The question as to whether the adoption of the constitution of the State of Georgia of 1868 was the act of the people of the state, is a political one, in which the courts must follow the action of the political department of the government.

A state can no more pass a law violating a contract by means of a convention, than it can by means of a legislature, and a constitution adopted by the state, with a view to its admission or readmission or after its admission into the Union, must be

regarded as a law of the state and amenable to the prohibitory charges of the constitution of the United States."

Romine vs. State, et al. (Washington), 34 Pac. 924, from the syllabus:

> "An act of congress enabling a territory to become a state has no binding force on the people of the territory until they have adopted a constitution, and the territory has been admitted into the Union; and then, if, by their constitution, the people have expressed no dissent from any proposition contained in the enabling act, they are bound by its provisions."

Brittle vs. The People, 2 Neb. 198, is a case decided by the Supreme Court of Nebraska wherein a question arose as to the right of a colored person to sit as a juror. In 1864 the constitution was prepared and submitted to the people, which provided that all free white males otherwise qualified and none others shall be competent jurors. The constitution with this provision in it was submitted under an act of congress and by the people rejected. Afterward and in 1868 the same constitution was again submitted to the people and by them adopted and transmitted to congress for its approval. Congress changed the language of the constitution so as to provide that there should be no denial

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by reason of race or color of the right of male citizens to sit as jurors, and so as to provide that the act should take effect upon the fundamental condition, that within the State of Nebraska there should be no denial of the elective franchise or any other right of any person by reason of race or color, except Indians not taxed. The state legislature passed an act ratifying and accepting the fundamental condition and in such legislative act declared that the act of congress should be a part of the organic law of the State of Nebraska. It was contended that the legislative act was not binding upon the people of the state and it was argued that congress had no right to impose that provision because in doing so it was not admitting the state upon an equal footing with the other states of the Union.

Quoting from the opinion:

"It may be innocent vanity to arrogate to ourselves great importance as 'the people' and talk of the unwarranted interference by congress in attempting to thrust upon this 'people' institutions and laws against their wishes; but we should not forget that the very territory we are on was purchased and owned by the people of the United States; that they have directed congress, under the constitution, to make all

needful rules and regulations respecting the territory; that, as long as we were on this territory, we were subject to, and had to abide by, such laws as they chose to make; and that not until we were strong enough to defeat the United States by arms could we hope for any change from such territorial rule without the permission of congress. How is such change to be effected? Some one or some body, assuming to act for the people, may make a constitution, and may elect officers for the proposed state. Congress may refuse to recognize such state government. It therefore amounts to naught. The people may assemble as often as they see proper, and may make, from time to time, a score of proposed constitutions, and elect as many sets of officers. Each is as good as the other: and all are good for nothing unless indorsed by congress. It is an act of congress that gives validity to the action of the people. By Article IV, Sec. 3, of the United States Constitution, it is declared, 'New states may be admitted by the congress into this Union.' No other authority exists anywhere for the admission of new states. This is all that is said. The manner in which such states shall be formed, or how they shall be introduced, is nowhere prescribed. It is a political question, to be settled by the people of the territory on the one side, and

congress on the other. When the fact of admission is established, the courts are bound by it, and cannot go behind it.

"We have now established several propositions, in the light of which we can understandingly look at the action of congress and of our own people in establishing the fundamental condition under consideration. In 1864, congress proposed that we might then frame a constitution, giving political rights to white males alone, if we desired, and we could be admitted. We refused to do so. In 1867, when we desired admission with such a constitution, we were told, in effect, that the proposition of 1864 was not a standing offer; that, in the march of events, the black man had risen in the consideration of the nation represented by congress; and that in all the dominion under the jurisdiction of congress, including Nebraska territory, the right of franchise had been granted to black and white alike, and that no steps would be taken backward. We were rejected with our proposed constitution. Congress, in turn, by the fundamental condition attached, amended our proposed constitution by erasing the word 'white' and returned it to the state legislature to approve for the people of the territory. And here, I may remark in passing, is the first of all the proceedings had up to this time which had the semblance of regularity.

> What had gone before, we have seen, was transacted by any one who chose to act, and was done in the most irregular manner. Up to this time, congress, which could legally give any direction in the matter, had taken no notice of our proceedings, and given no warrant for our action. But it is said the state legislature had no authority to accept the amended constitution. Grant it. Congress, however, assumed to recognize it as the representative of the people, and the legislature assumed to act for them. Agents not unfrequently transcend the limits of their authority."

From the opinion in Green et al. vs. Biddle, 8 Wheat., 1, it appears that when Kentucky was created a state and carved out of Virginia, there was a provision in the compact made between Virginia and Kentucky upon the separation of the latter from the former state which was made a part of the constitution of Kentucky. This compact provided: "That all private rights and interests of lands within the said district derived from the laws of Virginia shall remain valid and secure under the laws of the proposed state and shall be determined by the laws now existing in this state." (Meaning the State of Virginia.) Congress assented to the compact between the two states.

In 1797 and 1812, Kentucky passed an occupying claimant act which placed a burden upon lands which had not existed under the laws of the States of Virginia and Kentucky. The Supreme Court of the United States in Green vs. Biddle, supra, declared the law of Kentucky unconstitutional and held the state of Kentucky to its compact with the State of Virginia.

The same question was again before the Supreme Court of the United States on re-hearing. In an opinion delivered by Mr. Justice Washington the same conclusion was reached. It was argued that the limitations imposed by the compact were not of a character which must necessarily be respected by the sovereign State of Kentucky because the state in its sovereign capacity could not be bound by the compact in question and in answer to that, it is said in the opinion:

> "The next objection which is to the validity of the particular clause of the compact involved in this controversy, rests upon a principle, the correctness of which remains to be proved. It is practically opposed by the theory of all limited governments, and especially of those which constitute this Union. The powers of legislation granted to the government of the United States, as well as to the several state

governments, by their respective constitutions, are all limited. The article of the constitution of the United States, involved in this very case, is one, among many others, of the restrictions alluded to. If it be answered that these limitations were imposed by the people in their sovereign character, it may be asked, was not the acceptance of the compact the act of the people of Kentucky in their sovereign character? If, then, the principle contended for be a sound one, we can only say, that it is one of a most alarming nature, but which, it is believed, cannot be seriously entertained by any American statesman or jurist."

Further on in the opinion, in speaking of the effect to be given to the compact, it is stated:

"A slight effort to prove that a compact between two states is not a case within the meaning of the constitution, which speaks of contracts, was made by the counsel for the tenant, but was not much pressed. If we attend to the definition of a contract, which is the agreement of two or more parties, to do, or not to do, certain acts, it must be obvious, that the propositions offered, and agreed to by Virginia, being accepted and ratified by Kentucky, is a contract. In fact, the terms compact and contract are synonymous; and in Fletcher vs.

> Peck, the chief justice defines a contract to be a compact between two or more parties. The principles laid down in that case are, that the constitution of the United States embraces all contracts, executed or executory, whether between individuals, or between a state and individuals: and that a state has no more power to impair an obligation into which she herself has entered, than she can the contracts of individuals.

The Supreme Court has had occasion in the later case of Hawkins et al. vs. Barney's Lessee, 5 Pet. 456, and in Kentucky Union Company vs. Commonwealth of Kentucky, found in the advance sheets, February 1, 1911, page 171, to further consider and discuss the questions involved in the case of Green vs. Biddle, supra, and we do not find that the principles laid down in Green vs. Biddle have been set aside or even modified.

It was contended in the court below, and the decision proceeds upon the theory that the decision in Green vs. Biddle, supra, and kindred cases rested solely upon the ground that the conditions of the enabling acts accepted by the states and upheld by that decision, were attached to grants of land or related to some of the powers expressly vested in the federal government by the constitution of the United States. In

other words the question arose as to whether the power of congress to propose these conditions was limited to proposing the conditions directly related to some of the subjects, in express language given to the federal government by the constitution.

There are two direct answers to this question. The first is that the courts do not place their decisions upon the ground that the conditions proposed and accepted were attached to grants of subjects of specific federal jurisdiction, but upon the broad ground of the power of sovereigns to contract in relation to the exercise of some of the governmental functions of either. The Biddle case, though not as broad as some of the other reported cases, clearly shows the questions raised and the grounds of decision, and will suffice as an example of all. On page 39 of the reported case are set forth the contentions of Mr. Clay:

> "1st. That the supposed compact had not been constitutionally made.
>
> "2nd. That if the compact is to be interpreted as restraining the State of Kentucky from passing the laws in question, the restraint itself would be unconstitutional and void."

And again on page 43 his contentions are set out more at length:

> "It is incontestible that there are some attributes of sovereignty of which a state cannot be deprived even with the concurrence of congress and the state itself. * * * * * Whatever one state can do, all can do. The pressure of the whole upon all the parts is equal and all the parts are equal to each other. The implied prohibition extends to every compact, in every form by which a state seeks to deprive herself of her sovereign faculties."

These were the contentions made in that case and overruled by the court. The question was not, may a grantor attach a condition to a grant, but may a state waive by compact the exercise of some of her sovereign power? Mr. Clay's contentions are the same as those of the appellees here. Each are conclusively answered by the language of the Supreme Court of the United States:

> "Every government has, and from the nature of sovereignty must have, the exclusive right of regulating the descent, distribution and grants of the domain within its own boundaries, and this right must remain until it yields it up by compact or conquest."

Here is no decision that a grantor may attach conditions to his grant, but a positive and

forceful declaration that a state may yield the exercise of a portion of its sovereignty by compact, and again the court sets forth the contention in the case and the answer to it:

> "It was contended by the counsel for the tenant * * * 2nd. The clause of it (the compact) applicable to the point in controversy was so, inasmuch as it surrenders, according to the construction of it given by the opposite counsel, rights of sovereignty which are unalienable."

The court answers:

> "2nd. The next contention which is to the validity of the compact involved in this controversy rests upon a principle, the correctness of which remains to be proved. It is practically opposed by the theory of all organized governments and especially of those which constitute this Union. * * * * * * If it be answered that these limitations were imposed by the people in their sovereign character it may be asked, was not the acceptance of the compact the act of the people of Kentucky in their sovereign character?"

Here the court is discussing, not the rights of grantor and grantee, but the right of the people "in their sovereign character" to enter into compacts generally. The contention there and the contention of opposing counsel here the

highest court of our land says "cannot be seriously entertained by any American court or jurist." And upon the careful examination of the cases cited, which we know the court will give them, it will be apparent that as shown above in Green vs. Biidle, the court was deciding broadly the rights of sovereigns and not basing its decision upon any supposed conditions attached to grants.

The second answer, if any be needed, to the question under discussion, is that if it be necessary to point out any authority in congress to propose these conditions, it is found in the broad power given by the constitution to admit new states. The federal constitution is an instrument laying down broad fundamental principles and powers, and its grants of power are to be given that broad meaning which is intended. Congress is vested with the power to propose anything for acceptance, which in its judgment will conduce to the welfare of the people of the new state. The constitution does not say that congress may propose to new states that they shall not locate their capital for a term o fyears. These things are left to the discretion of congress to propose and of the ne wstates to accept or reject. It is not necessary that the specific

power be given, as appellant seems to contend. The Supreme Court of the United States has effectively answered this contention in In re Yarborough, 110 U. S., 658, where they said:

> "The proposition that it has no such power is supported by the old argument often heard, often repeated and in this court never assented to that when a question of the power of congress arises, the advocate of the power must be able to place his finger on words which expressly grant it."

In Bennett vs. Boggs, federal case No. 1319, a compact between the State of New Jersey and Pennsylvania was upheld and enforced as being a valid contract and one which was enforcible in court.

In Albee vs. May, federal case No. 134, again the federal courts uphold a compact between states and enforce it.

In Hancock vs. Walsh (3 Woods 351), federal case No. 6012, from the syllabus:

> "By the terms of the joint resolution of the congress of the United States for the annexation of Texas as a state in the Union, she was allowed, as one of the conditions of annexation, to retain the vacant unappropriated lands within her limits, to be applied to the payment of the debts and liabilities of the republic of Texas. This resolution

having been assented to by the convention of Texas, it is not within her power to refuse compliance with its conditions.

"Whether the resolution of annexation and its acceptance by Texas, is to be considered as a treaty or a contract, it is equally binding on the state, and she cannot escape from its obligation."

The great state of Texas undertook to repudiate an obligation which she had entered into with a citizen of the state of Kentucky. In the resolution of annexation and in its acceptance by Texas, the state agreed to keep inviolate its contracts and obligations. Afterward a constitutional convention of the state undertook to annul the contract, but the Supreme Court of the United States, finding that Texas, when it was admitted into the Union, had made a compact with the United States, under which the contract in question might not be violated, held the contract enforcible and would not permit the state of Texas to violate its compact with the United States.

In the case of Gray vs. Davis, et al. (1 Woods, 430), federal case No. 5715, the Supreme Court of the United States under the compact of annexation again holds the state of Texas to its contract.

In United States vs. Partello, 48 Fed. 670, a criminal action, it was urged upon the court, upon the argument of this case, that the people of Montana would have no right to agree as they did in the ordinance before mentioned, to permit a portion of its territory to remain under the jurisdiction of the national government. It was held, however, by the court, that that was a voluntary agreement made by the state of Montana through its people and in its sovereign capacity; that it was capable of making the contract and must abide by it.

In the case styled The Kansas Indians, found in 5 Wallace, page 737, the Supreme Court of the United States again deals with the effect to be given to the compact of states made with congress when admitted. It seems that in the state of Kansas the authorities undertook to tax lands which had been allotted to several defendant Indians; that the Indians objected and the Supreme Court of the state of Kansas held that such lands were taxable. The matter was taken before the Supreme Court of the United States and it was argued on behalf of the state of Kansas that under the sovereign powers of the state, the right to tax the land existed because of the fact that same had been allotted to the Indians

in severalty and that the government of the United States had parted with all of its title, and interest in and to said lands.

In the constitution of the State of Kansas, it was provided that the rights of the Indians would remain unimpaired and the general government should be at liberty, to make any regulation respecting them, their lands, property or other rights which it would have been competent to make if Kansas had not been admitted into the Union.

In the opinion, written by Mr. Justice Davis, it is said:

> "There can be question of state sovereignty in the case, as Kansas accepted her admission into the family of states on condition that the Indian rights should remain unimpaired and the general government at liberty to make any regulation respecting them, their lands, property, or other rights, which it would have been competent to make if Kansas had not been admitted into the Union."

By this language the court again lays down the principle that compacts made between the states and the general government are, in their nature, contracts between sovereign powers and as such cannot be abrogated or impaired except

by the common consent of the parties making such compacts.

Beecher vs. Wetherby, 95 U. S., 517-522:

"The state asserted title to the land under the compact upon which she was admitted into the Union. The act of congress of Aug. 6, 1846, authorizing the people of the territory of Wisconsin to organize a state government, contained various propositions respecting grants of land to the new state, to be submitted for acceptance or rejection to the convention which was to assemble for the purpose of framing its constitution. Some of the proposed grants were to be for the use of schools, some for the erection of public buildings, and some were to be of lands contianing salt springs. They were promised on condition that the convention should provide by a clause in the constitution, or by an ordinance irrevocable without the consent of the United States, that the state would never interfere with the primary disposal of the soil within it by the United States, nor with any regulations congress might find necessary for securing the title in such soil to bona fide purchasers; that no tax should be imposed on lands the property of the United States; and that in no case should non-resident proprietors be taxed higher than residents. And the act provided that if the propositions were ac-

cepted by the convention and ratified by an article in the constitution, they should be obligatory on the United States. The first of these propositions was "that section numbered sixteen (16) in every township of the public lands in said state, and where such section has been sold or otherwise disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to said state for the use of schools."

"The convention which subsequently assembled accepted the propositions, and ratified them by an article in the constitution, embodying therein the provisions required by the act of congress as a condition of the grants. With that constitution the state was admitted into the Union in May, 1848, 9 Stat. 233. It was, therefore, an unalterable condition of the admission, obligatory upon the United States, that section sixteen (16) in every township of the public lands in the state, which had not been sold or otherwise disposed of, should be granted to the state for the use of schools. It matters not whether the words of the compact be considered as merely promissory on the part of the United States, and constituting only a pledge of a grant in future, or as operating to transfer the title to the state upon her acceptance of the propositions as soon as the sections could be afterwards identified by the public surveys. In either

case, the lands which might be embraced within those sections were appropriated to the state. They were withdrawn from any other disposition, and set apart from the public domain, so that no subsequent law authorizing a sale of it could be construed to embrace them, although they were not specially excepted. All that afterward remained for the United States to do with respect to them, and all that could be legally done under the compact was to identify the sections by appropriate surveys; or, if any further assurance of title was required, to provide for the execution of proper instruments to transfer the naked fee, or to adopt such further legislation as would accomplish that result. They could not be diverted from their appropriation to the state."

"In Cooper vs. Roberts, 18 How., 173 this court gave construction to a similar clause in the compact upon which the State of Michigan was admitted to the Union, and held, after full consideration, that by it the state acquired such an interest in every section 16 that her title became perfect as soon as the section in any township was designated by the survey. "We agree," said the court, "that, until the survey of the township and the designation of the specific section, the right of the state rests in compact —binding, it is true, the public faith, and depending for execution upon the political

authorities. Courts of justice have no authority to mark out and define the land which shall be subject to the grant. But, when the political authorities have performed this duty, the compact has an object upon which it can attach, and, if there is no legal impediment the title of the state becomes a legal title. The jus ad rem, by the performance of that executive act, becomes a jus in re, judicial in its nature, and under the cognizance and protection of the judicial authorities, as well as the others."

In that case, it appears that the lands were promised on condition that the convention should provide, by a clause in the constitution, or by an ordinance irrevocable, that without the consent of the United States, the state would never interfere with the primary disposal of the soil within it by the United States, and it would appear that the Supreme Court of the United States, by the language thus used, regard an acceptance of conditions, by an ordinance irrevocable, as being, at least, equivalent to the adoption, by the convention, of a clause in the constitution. Further on in the opinion, the court said:

"It was, therefore, an unalterable condition of the admission obligatory upon the United States, etc."

Now, why was this obligatory upon the United States? It was because of the compact which had been made with the state, and because of the acceptance, by the state of the promise. The lands referred to were appropriated to the state, and no subsequent law authorizing the sale of lands would be construed to embrace them, although they were not specially excepted.

And the opinion further says:

> "Afterwards, all that could be legally done, under the compact, was to identify the sections by appropriat esurveys."

This decision gives effect to a compact between a state and the federal government and lays down the rule that a compact of the character in that case, no stronger than the one we are here considering, was one which was absolutely binding upon the United States and created an unalterable condition of the admission of the state into the Union; that all that could be legally done, under the compact, was to carry it into effect, and that it was the duty of the courts to so hold.

People vs. Roberts, 18 Howard, 173, is to the same effect.

We find by numerous authorities that a state has, by its delegates to its constitutional

convention, or otherwise, waived its jurisdiction to punish for crimes committed within its boundaries, and surely the punishment for crime is one of the highest duties and attributes of sovereignty possessed by a state or nation, and this attribute of sovereignty is possessed in its fullest extent by the original states of the Union. It is a legislative as well as a constitutional power which inheres in sovereignty, and certainly of equal dignity with the power to locate a state capital, in fact, much greater.

Now, when a state surrenders some of its power in this respect does this make the state unequal in the sense contended for and is it beyond the power of the state to make a compact by which it agrees to such surrender? Let the courts answer this question.

> United States vs. Partello, supra, 48 Fed. 673.

The enabling act for Montana provided among other things that:

> "And said convention shall provide, by ordinance irrevocable, without the consent of the United States, and the people of said state, * * * That the people inhabiting said proposed state do agree and declare that they forever disclaim all right and title to the unappropriated public lands ly-

ing within the boundaries thereof, and to all lands lying within said limits owned or held by an Indian or Indian tribes, and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States. * * * "

In the proclamation admitting the State of Montana into the Union appears the following language:

"And whereas it has been certified to me by the governor of said territory that within the time prescribed by said act of congress, a constitution for the proposed State of Montana has been adopted, and that the same, together with two ordinances connected therewith, has been ratified by a majority of the qualified voters of said proposed state in accordance with the conditions prescribed in said act."

In the enabling act it will be observed that the constitutional convention for that state was required to adopt, by ordinance irrevocable, the provision with reference to the jurisdiction of congress over certain Indian lands lying within the borders of said state. This ordinance was adopted.

A prosecution for rape upon the person of a white woman was instituted against a white man, it being alleged that the crime was committed in an Indian reservation. This prosecution was instituted in a federal court. As a defense it was claimed that the state courts of Montana alone had jurisdiction to punish for the crime charged, and

> "It was urged to the court upon the argument of the case that the people of Montana would have no right to agree as they did in the ordinance before mentioned permitting a portion of its territory to remain under the jurisdiction of the national government."

Here then we find a case squarely in point upon the precise question here involved, that is to say the power of a state through its delegates in a convention called to frame its constitution, to make a compact with the national government by which the state agreed to surrender a part of its legislative and constitutional authority in a matter wherein the state, without said surrender, would have such authority, this surrender involving one of the highest attributes of sovereignty, by which the state was deprived in part of a right possessed by the original states and all other states of the Union where said right had not been surrendered.

The opinion upon the precise point involved in the question submitted reviews at length the decisions of the Supreme Court of the United States upon the question involved:

In the opinion it is said:

> "In the case of U. S. vs. McBratney, 104 U. S., 621, the Supreme Court, while holding that the act admitting Colorado into the Union so modified the term "Indian country" that the United States had no jurisdiction of the crime of murder committed by one white man upon another on the Ute reservation, used this language as to the admission act of Colorado: 'And the act contains no exception of the Ute reservation, or of jurisdiction over it; clearly intimating that it might have made a difference with the rule established in that case, if it had. In the case of Ex Parte Crow Dog, supra, it will be observed that this language was used in defining Indian country: "Excluding, however, any territory embraced within the exterior geographical limits of a state not excepted from its jurisdiction by treaty, or by statute, at the time of its admission into the Union." Here it is intimated that, if by a statute, at the time of admission of a state in the Union, any portion of the same was excluded thereby from the jurisdiction of the state, such portion of

said state would remain Indian coutnry. It would seem, also, from that decision, that, although a portion of the state was not excepted from the jurisdiction thereof by treaty or statute, yet, if occupied by Indians, congress might have jurisdiction over the same under the constitutional power to regulate commerce with the Indian tribes, and under any treaty in pursuance of it. Under the last power, it would have to appear that the offense charged in some way interfered with commerce with the Indian tribes. But the right to legislate for Indian country was not so limited. In the case of U. S. vs. Ward, 1 Woolw. 17, Justice Miller, while holding that the act admitting Kansas into the Union repealed the jurisdiction of the United States over any portion of the state which had before that time been classed as Indian country within its borders, which was not excepted from the limits of the state by treaty with the Indians and some provisions in the admission act says:

"And the converse of this proposition is inferable; that is, that congress intended to and did concede to the new state, and it acquired and holds irrevocably, except as it sees fit to surrender the same, full right and authority to legislate to enforce her laws and to exercise plenary jurisdiction

over all such parts of her territory as were covered by such treaties."

"Here it is intimated that, if Kansas had seen fit to surrender its jurisdiction over any portion of her territory to the United States it would not have plenary jurisdiction over the same.

"Taking these decisions together, and there is an intimation that in the act, in admitting a state into the Union, there might be a statute or a treaty by which a portion of the territory of such state might remain under the jurisdiction of the United States, or the state might cede its jurisdiction over certain territory to the United States. Judge Dillon, in the case of U. S. vs. Yellow Sun, 1 Dill, 272, said of the opinion of Justice McLean, in U. S. vs. Bailey, 1 McLean, 234, upon which the counsel for defendant places much reliance:

"In view of the peculiar relations of the Indian tribes, I think I ought to observe that I am not at present prepared to yield assent to the opinion which Mr. Justice McLean seems to have entertained in the Bailey case, that congress had no power to pass the act of 1817, (3 St. 383:) that is, that congress could not, if it saw fit, make punishable in national courts offenses committed by or against Indians upon reservations in state limits. And it might be worth the con-

sideration of congress whether some such legislation might not be expedient."

"Here is an intimation that, in the opinion of that distinguished jurist and writer, congress might enact a statute punishing a white man for an offense committed upon an Indian, upon a reservation within the limits of a state, and this right is not placed upon the power to regulate commerce among Indian tribes. This would be the assertion of jurisdiction over a white man upon an Indian reservation by the United States in matters other than those within the peculiar and specific jurisdiction of the general government.

"Let us see what congress and Montana have done toward conferring the jurisdiction of the United States over the Crow Indian reservation. In an act entitled "An act to provide for the division of Dakota into two states, and to enable the people of North Dakota, South Dakota, Montana and Washington to form constitutions and state governments, and to be admitted into the Union on an equal footing with the original states," etc., approved February 22, 1889, in reference to the convention in each territory named, organized to form a constitution for the proper state, we find the following, in section 4:

"That the people inhabiting said proposed state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian tribes, and that until the title thereto shall have been extinguished by the United States the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States." * *

"But nothing herein, or in the ordinances herein provided for, shall preclude the said states from taxing, as other lands are taxed, any lands owned or held by any Indian who has severed his tribal relations."

"In compliance with this provision of the statute under which Montana was admitted into the Union, the convention that framed the constitution adopted by the people of Montana, provided by ordinance as follows:

"That the people inhabiting the said proposed state of Montana do agree that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes, and that until

the title thereto shall have been extinguished by the United States they shall be and remain under the absolute jurisdiction and control of the congress of the United States; * * * that the ordinance of this article shall be irrevocable without the consent of the United States and the people of the State of Montana."

"It is evident that the lands referred to in this ordinance, and the lands in the statute mentioned, over which the congress of the United States was to retain absolute jurisdiction, were the Indian lands to which the Indians held but the right of occupancy. The question here presented is, what did congress intend by the clause, "and said Indian lands shall remain under the absolute jurisdiction and control of the United States;" and what did the convention that framed the Montana constitution intend by it? This provision does not occur, as far as I have been able to investigate, in the acts providing for the admission of any other states into the Union than in the one above referred to. And I am not apprised that any ordinances similar to the one named above were ever adopted by any other states than those enabled to form constitutions under the same act which gave that privilege to the people of Montana. In the first part of the portion of section 4 of

said act quoted above it appears that, as an individual proprietor, the United States was fully protected in regard to its rights to Indian lands, and the Indians were protected in their rights of occupancy. It does not seem that the clause under consideration could add anything to the rights of the United States in regard to these lands as a proprietor. In Montana there were no Indian lands save those included in Indian reservations, except some lands held by certain of the Flat Head Indians in the Bitter Root valley. These lands were held in severalty, and they had a title from the United States to the same different from that of the right of occupancy. Evidently they were no part of the Indian lands referred to. As I have said, these were lands to which the Indians held only the title of occupancy, and which the United States reserved the right to dispose of, not lands granted to Indians in severalty. It is reasonable to suppose that congress passed the above act, and the people of Montana adopted the above ordinances, with reference to the fact that Indian lands proper were those included in the Indian reservations. It was agreed by the ordinance above referred to, that congress was to retain the absolute jurisdiction and control over these Indian lands within the Indian reservations in Montana. The word "jurisdiction" as used in the

clause, when applied to congress, means the power of governing such lands; to legislate for them; the power or right of exercising authority over them. These are the definitions of this word which will be found in Webster's Dictionary. When we speak of the right to govern certain lands, we not only mean the right to do something with the land itself, but to legislate for and control the people upon said lands, as well as to legislate concerning the land itself. When we say congress has the right to legislate for a place within its exclusive jurisdiction, we mean for the people who are there, as well as concerning the land itself. In the case of U. S. vs. Ward, supra, Mr. Justice Miller, after speaking of the treaty with the Shawnee Indians which excluded their reservation from the State of Kansas, and after declaring to some extent the effect of the act admitting Kansas into the Union, said, further: "Or, rather, to express the matter more exactly, all territory which was not covered by such treaties was included with the state, its jurisdiction, and within its territory, and this irrevocably and exclusively."

"In a treaty with the Crow Indians, made by the United States in 1868, after describing the tract of land set apart as a reservation for these Indians there is this clause in reference to this tract:

"Shall be and the same is set apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States to admit amongst them; and the United States now solemnly agrees that no person except those herein designated and authorized of the government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or so to do, and except such officers, agents, and employes reside in the territory described in this article for the use of said Indians, and henceforth they will and do hereby relinquish any portion of the territory of the United States except such as is embraced within the limits aforesaid."

"Now, if it should be held that, in the language of Mr. Justice Miller in U. S. vs. Ward, supra, the act of congress admitting Montana into the Union awarded it "all territory, which was not covered by such treaties, (as that with the Shawnees, which the Crow treaty is not,) was included within the state, within its jurisdiction, and within its territory, and this irrevocably, unqualifedly, and exclusively," what became of this treaty with the Crows so solemnly entered into? In its main feature it

was broken by that act, with that construction forced upon us. Did congress intend to do this? Is it not more reasonable to infer that congress intended by the clause referred to to reserve the power to observe that treaty and others of a similar character It does appear to me that not only the language of said clause but the circumstances which confronted congress, must have been such as to leave no room to doubt that it was the intention that such Indian reservations as the Crow should be left under the jurisdiction and control of the national government, as long as the lands therein remained Indian lands.

"It was urged upon the court, upon the argument of this case, that the people of Montana would have no right to agree as they did in the ordinance before mentioned, and permit a portion of its territory to remain under the jurisdiction of the national government.

"In the case of Railroad Co. vs. Lowe, 114 U. S., 525, 5 Sup. Ct. Rep. 995, the Supreme Court, while holding that a state could not cede any of its lands to a foreign country because of the rights of the national government, said:

"In their relation to the general government, the states of the Union stand in a very different position from that which

they hold to foreign governments. Though the jurisdiction and authority of the general government are essentially different from those of the state, they are not those of a different country, and the two, the state and general government, may deal with each other in any way they may deem best to carry out the purposes of the constitution."

And it was held in that case that a state could cede to the United States for federal purposes a tract of land within its limits in a manner not provided for specifically in the constitution of the United States. It would seem that there is no legal objection to the agreement made by the people of the State of Montana in convention assembled to the effect that congress should retain jurisdiction and control over the Indian reservations within its borders."

In the face of these adjudicated cases, settling the question as they do beyond a controversy, can it be said that the contention of counsel can be a sound principle of law? Shall it be said that the state may waive its natural and inherent attributes of sovereignty involved in the extension of its criminal laws over all its territory, its right to punish for crimes committed against its laws and may not waive the question involved in the temporary location of its

state capital? And yet such must be the state of the law, if the contention of counsel be sound. That the contrary is the settled law of the country must be conceded by a reading of the case last reviewed and the cases therein cited and quoted from.

It is contended that this case involves a political question growing out of the right of the people of the state to surrender legislative powers, yet such was the question presented in all of the cases referred to in United States vs. Partello, supra. So it is in the later case of Matter of Heff, 197 U. S. 488, as expressly stated therein by Mr. Justice Brewer in the opinion at page 508 and 509, and in the concluding paragraph of the opinion in which it is said:

> "We are of the opinion that when the United States grants the privileges of citizenship to an Indian, gives to him the benefit of and requires him to be subject to the laws, both civil and criminal, of the state, it places him outside the reach of police regulations on the part of congress; that the emancipation from federal control thus created cannot be set aside at the instance of the government without the consent of the individual Indian and the State. * *"

Not the significance of the language:

> "That the emancipation from federal control thus created cannot be set aside at the instance of the government without the consent of the individual Indian of the state."

The converse of the proposition is, of course, to the effect that with the consent of the Indian and of the state the control may be resumed.

There is another decision of the Supreme Court of the United States that must not be overlooked when considering this question. Indeed, the overlooking of it, it seems to us, renders any brief or opinion imperfect, for it is, in in our judgment, the most directly in point of any or all of the decisions of the federal courts or the state courts upon this most important question. The case is that of Boyd vs. Thayer, 143 U. S., 135.

In that case the Supreme Court of Nebraska held invalid the provisions of congressional legislation enabling Nebraska to form a constitution and state government and become admitted "into the Union on an equal footing with the original states," which recognized as citizens all persons who were already citizens of the United States, and also all who had declared their intention to become such, and also held Governor-elect Boyd ineligible to hold office

under the state constitution which prescribed two years' citizenship in the United States as a necessary qualification for such office, this constitutional provision not being in harmony with the provisions of the enabling act. The Supreme Court reversed the decision of the state court, and held the provisions of the enabling act binding over the terms of the state constitution in reference to eligibility to hold office —a purely political matter in the state. The constitution of Nebraska of 1875 provided:

> "No person shall be eligible to the office of governor or lieutenant governor who shall not have attained the age of thirty years and been two years next preceding his election a citizen of the United States and of this state."

The organic act of the territory of Nebraska provided:

> "That the right of suffrage and of holding office shall be exercised only by citizens of the United States and those who shall have declared on oath their intention to become such," etc.

The acts of congress with reference to the admission of Nebraska to statehood recognized and upheld the right of those then in the state to suffrage and to hold office under existing

laws, and thus was brought about the conflict between the constitution of the state and the congressional or enabling acts with reference to eligibility to office. Boyd had gone to Nebraska as an Irish boy; was in the territory at the time of its admission to the Union; had been in the territorial legislature, and was a member of the constitutional convention; and this case, although its consideration was purely of a political right, establishes the binding force of the enabling act adopted by the representatives of the state. (The enabling act there was adopted only by the state legislature and certainly was not adopted by any higher authority or with any greater sanctity than the enabling act in this case, which was adopted by ordinance irrevocable by the constitutional convention to which was delegated the authority to form a constitution and state government to prepare a constitution to be submitted to the electors of the proposed state, and to adopt by ordinance irrevocable, which was not to be submitted to such electorate, the terms which congress had prescribed as conditions precedent to the admission of the proposed state into the Union.) The court there expressly referred to the terms of the congressional declaration of admission of the state of Nebraska which were "and is here-

by admitted into the Union upon an equal footing with the original states in all respects whatever," and said:

> "Admission on an equal footing with the original states in all respects whatever involves equality of constitutional right and power, which cannot AFTERWARD be controlled."

But the court expressly declared what was the power of congress before the state was admitted, and that is the question here. There the court said:

> "It follows from these documents that congress regarded as citizens of the territory all who were already citizens of the United States, and all who had declared their intention to become such. Indeed, they are referred to in this section three of the enabling act as citizens, and by the organic law the right of suffrage and of holding office had been allowed to them. Those whose naturalization was incomplete were treated as in the same category as those who were already citizens of the United States. What the state had power to do after its admission is not the question. Before congress let go its hold upon the territory, it was for congress to say who were members of the political community."

And so, we say here, before congress let go its hold upon the territory, "it was for congress to say" for what limited period of time, a very few years indeed, the capital which it had already created and established for this people should remain the capital of this people, with the consent and acquiescence of the state, expressed and exhibited by ordinance irrevocable by its duly constituted authority, the constitutional convention which was expressly delegated with authority to bind the state by ordinance irrevocable, adopting the terms of this briefly limited location of the seat of the then territorial and subsequently state government.

The binding force of the capital clause cannot be wiped out, it seems to us, without ignoring the Boyd vs. Thayer case.

It appears to make no difference whether it is a political right or a property right in so far as we have been able to determine. As before stated, we have found no case where the authority of the state to enter into a compact, which, by the voluntary act of the state or of the people representing such state, surrenders some part of the sovereignty, has been denied. It must of necessity exist, or the people would not have the elements of sovereignty. The funda-

mental distinction between a republic and monarchy grows out of the very rights for which we are here contending. In a monarchy, the crown would make the contract, here the people, exercising the powers which are exercised by a people, under a free government, act for themselves. This is a government of written laws, all powers are incident to this sovereignty, but these powers can only be exercised in this country under the written constitutions and laws made in pursuance thereto, because the people are sovereign in their powers; they make their own constitutions and their own laws; they abide by their own constitutions and own laws until they are changed in a manner which they themselves have provided. The states of the Union have surrendered a portion of their sovereignty, as expressed in the constitution of the United States. Each state acting as an independent sovereignty, may, within certain limitations, which are well defined, yield in respect to matters which, if it had not yielded, the authority of the state would have been supreme.

So here in the case under consideration, if it shall be held that the people of the State of Oklahoma, may not refrain, temporarily, from the exercise of a legislative power and make a binding contract to that effect, then it must fol-

low that the people of Oklahoma are not a sovereign people.

We will now review some of the cases cited and quoted by the court in the majority opinion by Mr. Justice Williams, and upon which the conclusions arrived at by the majority of the Supreme Court of Oklahoma are based.

Pollard et al., vs. Hagan et al., 3 Howard 212. This case involves a private right in property, the title of land being in dispute. Upon the one hand, title is claimed from the United States; upon the other from the State of Alabama.

The history of this case is very peculiar. In the case of Pollard vs. Files, 2 Howard, 591, the precise question had been before the Supreme Court of the United States, and fully considered. In such case, it was held that the title properly flowed from congress. Pollard vs. Files followed a case, styled Pollard's Heirs vs. Kibbe, 14 Peters, 353, which had also sustained the title which ran from congress. The cases were otherwise the same in principle as the case of Pollard's Lessee vs. Hagan et al. (See dissenting opinion of Mr. Justice Catron, 3 Howard, 231.)

In discussing the peculiar facts relating to the previous decisions and the decision in Pol-

lard, Lessee, vs. Hagan, Mr. Justice Catron, in his dissenting opinion, states that the assumption that all lands temporarily flooded with tide waters were a part of the public domain and a sovereign right in the old states, and that the new states, when admitted into the Union took that character of lands as an incident of state sovereignty, was a doctrine which was previously unheard of in any of the courts of justice in this country; that it was claimed in the political discussions that the new states take the high lands as well as the low, and that it is difficult to say where the distinction lies, and he was unable to agree with the principle laid down in the case of Pollard's Lessee, vs. Hagan. However, in reading the history of the case, and investigating the common law, we believe that the reasons for the distinction grew out of the fact that tide lands were, by common law, held to belong to the sovereignty, while the high lands were not so considered, but, however this may be, and while the matter is a very interesting one as an abstract principle of law, yet we fail to see how the question of whether or not title to lands may be derived by antecedent treaties or in a direct way from the United States can have any bearing upon the question here involved, although in that case, the State of Ala-

bama had agreed to surrender all title to waste and unappropriated lands to the government of the United States in its compact of admission into the Union. If as held in that case, the surrender by Alabama of her rights and title to all waste and unappropriated lands, only embraced the public lands and did not include the lands below usual high water mark, then the United States took no title to the land in dispute which it could convey, and the conveyance from the state conveyed the superior title. The effect of this decision is that the United States attempted to convey what it did not own, and hence the title of its grantee failed. It is true that in the opinion the relative status of the State of Alabama toward the original states is discussed at length, and it is held that the original states owned the tide lands, by reason of their sovereignty, and the state of Alabama, having been admitted upon an equality with the original states, it followed that she retained the title to the tide lands. We do not regard the case of Pollard, Lessee, vs. Hagan, as standing upon the same principle as the case under consideration. There the United States attempted to convey lands she did not own. In this case congress submitted a proposition upon which she had a right to legislate, and the people of the two ter-

ritories in their sovereign capacity solemnly accepted the proposition, the two acts thereby constituting a mutual compact.

We also call the attention of the court to the language in the opinion in the case of Pollard et al. vs. Hagan, which is found at page 221:

> "We think a proper examination of this subject will show, that the United States never held any municipal sovereignty, jurisdiction, or right of soil in and to the territory, of which Alabama or any of the new states were formed; except for temporary purposes, and to execute the trusts created by the acts of the Virginia and Georgia legislatures, and the deeds of cession executed by them to the United States, and a trust created by the treaty with the French republic, of the 30th of April, 1803, ceding Louisiana."

Thus the Supreme Court of the United States places their decision squarely upon the proposition that congress held the tide lands only in trust for the benefit of the future states.

In Case vs. Toftus, 39 Fed., 730, the learned judge writing the opinion has taken occasion to criticise at some length the doctrine announced in Pollard et al. vs. Hagan et al., supra, and cites with approval the dissenting opinion of Mr. Justice Catron in that case, and we think

we are safe in concluding with Judge Deady that there never was any more reason in this country for holding that tide lands should belong to the states, than that the high and dry lands should.

Permoli vs. Municipality of New Orleans, 3 Howard, 589.

The question involved in this case arose under the provisions of the Northwest Ordinance for the government of the Northwest Territory and which was subsequently carried over the territory, afterward embraced in the State of Kentucky, and a part thereof subsequently incorporated in the State of Louisiana. The Northwest Ordinance was not a state ordinance and was never adopted by the State of Louisiana, being purely a territorial ordinance, the Supreme Court held that its operative effect was limited to the duration of the territory, and its further existence would depend upon the adoption thereof by the state.

In the opinion, it is said:

> "All congress intended, was to declare in advance, to the people of the territory, the fundamental principles their constitution should contain; this was every way proper under the circumstances; the instrument having been duly formed, and pre-

sented, it was for the national legislature to judge whether it contained the proper principles, and to accept it if it did; or reject it if it did not. Having accepted the constitution and admitted the state, "on an equal footing with the original states in all respects whatever," in express terms, by the act of 1812, congress was concluded from assuming that the instructions contained in the act of 1811 had not been complied with."

In speaking with reference to the ordinance of 1787 and its effect as regards the State of Louisiana it was further stated in the opinion:

> "But as regards the State of Louisiana, it had no further force, after the adoption of the state constitution, than other acts of congress organizing, in part, the territorial government of Orleans, and standing in connection with the ordinance of 1787."

Thus, we think, that it is fair to assume that the opinion in that case holds:

First—That congress never intended to require the state to incorporate into its fundamental law the provisions contended for, and

Second—If congress had so intended, its acceptance of the constitution and its admission of the state concluded it from claiming that

the constitution of the state was not in accordance with the fundamental principles required by congress.

So here, if the constitutional convention had prepared a constitution and by ordinance irrevocable the delegates thereto had accepted the enabling act, leaving out the provision relating to the location of the capital of the State of Oklahoma and congress, or the president of the United States, acting for congress, should have accepted such constitution and ordinance and admitted the State of Oklahoma into the Union, then it could be said that congress had assented to the change and no person could have complained, and if such had been the state of the case, we have before us, the authority cited would have been in point, otherwise, not.

Strader et al. vs. Graham, 10 Howard, 82.

82.

This case follows Pollard's Lessees, et al. vs. Hagan et al., and Permoli vs. The First Municipality, and seems to hold that the articles of the ordinance of 1787 were not in force in Mississippi, after it became a state, and that except in so far as its provisions had been incorporated into the new constitution, such provisions of the ordinance were superceded by the

adoption of the present constitution of the United States. We think this decision entirely correct in limiting the scope and effect of the ordinance of 1787, if for no other reason, because the ordinance must have been superceded when the new constitution was adopted by the states, if

Withers vs. Buckley, 20 Howard, 84.

This case was brought up to test the constitutionality of a law of Mississippi passed for improving the navigation of a river flowing into the Mississippi river, it being claimed that the act was in contravention of the enabling act admitting Mississippi into the Union, which act guaranteed the free navigation of the Mississippi river. In the opinion, it was held that the state law did not conflict with the act of congress with respect either to the letter or spirit of the act. (See page 92 of opinion.)

Escanaba vs. City of Chicago, 107 U. S., 678.

678.

The City of Chicago constructed bridges across the Chicago river with draws for the passage of vessels. A company owning vessels plying between lake ports brought an action to enjoin the city from closing the draws for the morning and evening hours, claiming that it was an interference with navigation. It was

contended that congress alone had the power to regulate commerce upon this navigable stream. The court held that in the absence of legislation by congress, the state and its municipalities might so construct bridges as to afford to all commerce within the city reasonable facilities, but in speaking of the paramount power of congress over the subject matter, the court said:

> "When its power is exercised, so as to unnecessarily obstruct the navigation of the river or its branches, congress may interfere and remove the obstruction. If the power of the state and that of the federal government come in conflict, the latter must control and the former yield. This necessarily follows from the position given by the constitution to legislation in pursuance of it, as the supreme law of the land. But until congress acts on the subject, the power of the state over bridges across its navigable streams is plenary."

And again on page 686, it is said:

> "The states have always exercised this power, and from the natuure and objects of the two systems of government, they must always continue to exercise it, subject, however, in all cases, to the paramount authority of congress."

This opinion sustains our contention as to the power of congress in case congress chooses to exercise its prerogative.

Huse vs. Glover, 15 Fed., 292.

This action was instituted to procure an injunction to prevent the collection of tolls levied under the Illinois statute upon vessels navigating the Illinois river. The river was improved under the state law, with locks, and it was claimed that the collection of tolls was in violation of the ordinance of 1787 for the government of the Northwestern Territory, which provided, among other things, that the navigable waters leading into the Mississippi and St. Lawrence rivers, etc., shall be common highways and forever free. It was held that the State of Illinois, in the absence of national legislation upon the subject, could improve the navigable waters within its limits in such mode and to such extent as to her might seem best, and that the statute authorizing tolls was valid. This case is directly in principle the same as Escanaba vs. City of Chicago, supra.

Cardwell vs. American Bridge Company, 113 U. S., 205.

The same principle is announced in this case as decided in the two preceding cases, and to the same effect is Sands vs. Manistee River

Improvement Co., 125 U. S., 288, and Willament Iron Bridge Company vs. Hatch et al., 19 Fed., 358, and the same case on review, in 125 U. S., 1, further confirms the same principle of law.

State of Penn. vs. Wheeling Bridge Company, 13 Howard, 518, also deals with the same subject matter.

We do not believe that these cases can in any manner sustain the contention of the majority opinion of our court. In all of the cases referred to, the court specifically states that the power to deal with the subject matter in dispute rests with congress wherever congress sees fit to exercise the same, but in the absence of congressional authority, the states may deal with the question.

We admit the same principle in the case we are presenting. In the absence of the compact and agreement between the State of Oklahoma and congress, of course, the State of Oklahoma could permanently locate its capital, whenever, in the judgment of the people of the state, such action is desirable.

Dred Scott vs. Stanford, 19 Howard, 393.

To enter into a discussion of what was held and decided in this case, would require more space than we think profitable to use in this

brief. The conclusions reached by a majority of the court probably correctly stated the law as it then existed. Much was set forth for and against the issues raised in the case, but the questions involved were in no sense similar to those in this case. The excerpt from the opinion in that case which is set forth in the opinion of our court, has, we think, no application here. If, however, we are wrong, the doctrine asserted has been greatly modified.

DeLima vs. Bidwell, 182 U. S., 1.

Ward vs. Race Horse, 163 U. S., 504.

Race Horse was a member of a tribe of Indians who were, under a treaty made by the United States upon a reservation, with a clause in such treaty to the effect that the Indians should have the right to hunt upon the uninhabited lands of the United States so long as game may be found thereon, and so long as peace subsists between the whites and Indians, upon the borders of the hunting districts. This reservation was in the territory of Idaho. Race Horse killed seven elks in the state of Wyoming about one hundred miles from the Indian reservation. The killing was in violation of the laws of the state of Wyoming. It was insisted that Race Horse could not be prosecuted for the violation of the laws of the state of Wyoming, and the

opinion denied to Race Horse the immunity claimed. The opinion proceeds upon the ground that the treaty with the Indians was abrogated by the subsequent law of congress admitting Wyoming into the Union.

> "Whatever the limitation upon her powers as a government whilst in a territorial condition whether from the ordinance of 1787 or the legislation of congress, it ceased to have any operative force, except as voluntarily adopted by her, after she became a state of the Union."

Thus recognizing the fact that the state voluntarily accepted the condition which permitted the Indians to hunt upon the uninhabited lands of the state.

In the opinion it is further said:

> "The enabling act declares that the state of Wyoming is admitted on equal terms with the other states, and this declaration, which is simply an expression of the general rule, which presupposes that states, when admitted into the Union, are endowed with powers and attributes equal in scope to those enjoyed by the states already admitted, repels any presumption that in this particular case congress intended to admit the state of Wyoming with diminished governmental authority."

Thus indicating that congress might have so intended.

Further on in the opinion:

> "Here the enabling act not only contains no expression of the intention of congress to continue the burdens in question in the state, but, on the contrary, its intention not to do so is conveyed by the express terms of the act of admission. Indeed, it may be further, for the sake of the argument, conceded that where there are rights created by congress, during the existence of a territory, which are of such a nature as to imply their perpetuity, and the consequent purpose of congress to continue them in the state after its admission, such continuation will, as a matter of construction, be upheld, although the enabling act does not expressly so direct."

Thus conceding that congress has and does exercise powers in respect to the admission of new states which may impose burdens or which may affect powers.

And further on in the opinion, in speaking of the question of the effect of the decision in the case of Kansas Indians, 5 Wallace, 737, and New York Indians, 5 Wallace, 761, as to the right of the state to waive its powers of taxation,

which, of course, is one of the highest attributes of sovereignty, it is said:

> "The first case (that of the Kansas Indians) involved the right of the state to tax the land of Indians owned under patents issued to them in consequence of treaties made with their respective tribes. The court held that the power of the state to tax was expressly excluded by the enabling act. The second case (that of the New York Indians) involved the right of the state to tax land embraced in an Indian reservation, which existed prior to the adoption of the constitution of the United States. Thus these two cases involved the authority of the state to exert its taxing power on lands embraced within an Indian reservation, that is to say, the authority of the state to extend its powers to lands not within the scope of its jurisdiction whilst this case involves a question of whether, where no reservation exists a state can be stripped by implication and deduction of an essential attribute of its governmental existence. Doubtless the rule that treaties should be so construed as to uphold the sanctity of the public faith ought not to be departed from."

Here, by the use of this language in the case cited by our court, we find an express recognition of the right of a state, by express reservation, to strip a state of an essential attribute

of its governmental existence, that is to say the reasoning and deductions of the court are sufficient upon which to base this statement. The opinion says, in effect, that where no reservation exists, the state ought not to be so stripped by implication and deduction.

Bolen vs. State of Nebraska, 176 U. S., 83.

In discussing the right of the state to enact its own procedure for the punishment of crime, it is said:

> "But this court has held in many cases that whatever be the limitation upon the power of the territorial government, they cease to have any operative effect, except as voluntarily adopted, after such territory has become a state of the Union."

Thus, again expressly recognizing, as we think, the right of the state to adopt, by compact or other appropriate manner, any limitation whatsoever, they may deem proper and best, touching their political status or powers.

Boyd vs. Nebraska, 143 U. S., 135, has heretofore been noted, and we believe that it is in entire harmony with and sustains the contention which we make in this case.

Williams vs. Hart, 110 Fed., 166.

This case expressly recognizes the right of the state to surrender a portion of their sovereignty, in language as follows:

"The people of the state are sovereign, except in so far as their sovereignty has been surrendered to the national government."

Hinman et al. vs. Warren, 6 Ore., 408.

This case is reviewed by Judge Deady in Case vs. Loftus, 39 Fed., 730, and we refer to said decision and will only add that it is impossible to accept the conclusion reached in Hinman vs. Warren without overturning a century of legislation and decisions to the contrary effect.

United States, Ex Rel, et al., vs. United States Express Company, 180 Fed., 1006. This case deals with a question of commerce between Arkansas and Oklahoma. We think the opinion goes farther than is necessary in deciding the case; that it is not essential to a decision to hold that the agreement between the state and congress relating to the sale and disposition of liquors in that portion of our state which was formerly Indian territory, is beyond the powers of the contracting sovereignties, and we do not agree with the statement that the state may not enter into and be bound by a compact of the character mentioned; neither do we agree that the constitution of the United States fixes the status of the new state, because such in-

strument is silent upon that question, and we also say that if congress and the state may not contract with reference to such matters, the principle laid down in Green vs. Biddle and Spooner vs. McConnell, and the many cases we have heretofore cited and quoted from, must of necessity be wrong. We also assert that if the court is right with reference to this matter here under consideration, that congress and the states contracting have been wrong with reference to the agreements not to require any religious test as a qualification for holding office, or that no plural marriages shall be permitted, or that the lands of non-residents shall not be taxed at a higher rate than the lands belonging to residents; that judicial proceedings shall be carried on in the English language, etc. We also assert that no state under the reasoning by Judge Rogers, could make a compact giving to the United States jurisdiction to punish for crime in Indian reservations or upon lands included in the forts, and most, if not all of the limitations described in the enabling acts and acceded to by the states when admitted, would fall by the wayside, if this opinion of Judge Roger's be sound. They are in most instances matters involving political rights, and matters over which the original states have jurisdiction,

and if the theory of equality as asserted in the opinion, be sound, every limitation upon the sovereignty of the state agreed to under the terms of an enabling act, must of necessity fail, if the true doctrine of equality is that the new states shall have all of the jurisdiction touching these matters about which these compacts have been made, which inhere in the original thirteen states.

Armstrong vs. Board of County Commissioners, (Ind.) 4 Blackford's, 208.

Newton vs. Board of County Commissioners, (Ohio) 26 Ohio State, 618.

These and kindred cases relating to the removal of county seats announce a principle of law about which we have no dispute. Unquestionably, if there were no constitutional prohibition, a county seat or state capital could be removed by legislative action as often and whenever the legislative authority might deem proper, and if it were dependent upon a constitutional provision alone, the people could form a new constitution and by so doing work a change of location, but that is not this case. The people of the state have entered into a compact which requires the assent of congress in order to change, at this time, the location of the capital,

and the question here is whether or not the state was competent to make such contract.

Edwards vs. Lesueur, (Mo.) 33 S. W., 1130.

It was claimed in this case that by the action of congress admitting the state into the Union, the action of the convention of the territory called in pursuance ot said act, and the subsequent legislation of the state in accepting and acting upon the conditions of said act, the seat of government was established at Jefferson City and could not be changed without the consent of congress.

From the opinion:

"The petition charges that, by the act of congress admitting the state of Missouri into the Union, the action of the convention called in pursuance of said act, and subsequent legislation of the state in conformity to the conditions of said act, the seat of government was established at Jefferson City, and cannot be removed therefrom without the consent of the United States. And upon this question, the court said:

"In answer to the first proposition, it may be sad iin the first place, that no such condition was coupled with the proposal submitted, by the act of congress. The acceptance should not be construed to be broader than the offer. The irrevocable

character of the ordinance must be construed to refer to the conditions which were required to be irrevocable. In the second place, the convention which accepted the terms proposed by congress, and which formed the state constitution, did not interpret the act as requiring that the seat of government should be selected, for it provided that the commissioners might purchase other land upon which to locate its seat of government. The convention would hardly have made an irrevocable agreement, and immediately proceeded to violate it. Third, the act of admission required a copy of the constitution, when framed, to be transmitted to congress. We must presume that the convention did its duty in this regard, and that congress knew the interpretation that had been given to the grant and, as the state government has ever been recognized by the United States, that it was satisfied with such interpretation, and ratified it. In the fourth place, the plain terms of the compact negative any intention of the United States to control the state in the future changes of its seat of government.

* * *

"No limitation whatever is placed upon its political or governmental power, or the power to manage its own internal affairs. The power, then to select and after-

ward if deemed expedient, to change, its own seat of government, is necessarily implied."

This language hardly supports the contention of appellant, in fact, it completely supports the opposite.

Stearns vs. Minnesota, Ex Rel., 179 U. S., 223.

In this case the court had before it a provision in the enabling act for the admission of Minnesota as a state, and the principle was therein announced that a state and nation were competent parties to make compacts. A large number of cases dealing with the subject were cited and discussed, and while it was stated in the opinion that there might be a distinction made between compacts involving political rights and those respecting property rights, yet the opinion was dealing with the latter class of contracts only and did not attempt to determine how far the courts would undertake to limit the powers of congress, and a state in making compacts involving political rights; and neither did the opinion review any of the decisions which dealt with such compacts. We have heretofore called attention to cases where political rights were involved.

Boyd vs. Thayer, supra, may be said to involve only a political right. So, too, we have those cases which involve reservations of lands within a state or forts, arsenals, etc., which are of that class of cases. Indeed, such is stated to be true in Ft. Leavenworth R. Co. vs. Low, 114 U. S., 525, wherein it is said:

> "And if, to their more effective use, a cession of legislative authority and political jurisdiction by the state would be desirable, we do not perceive any objection to its grant by the legislature of the state."

So, too, in United States vs. Partello, 48 Fed., 670, and

United States vs. McBratney, 104 U. S., 621.

Matter of Heff, 197 U. S., 488.

These are all cases involving political rights and obligations, and yet the competency of the contract and powers was considered and upheld in such cases.

In the matter under consideration the temporary location of the capital as stated by Justice Kane, in his dissenting opinion:

"Involves the least important subject embraced within the enabling act, and if the compact in relation to that cannot be upheld the power of compact between the federal govern-

ment and the people of the proposed state is limited, indeed, and heretofore has been very little understood by the contracting parties."

A number of text writers were quoted in the opinion of the court and relied upon to sustain the conclusions reached. The opinion of a text writer, however, cannot take the place of judicial decisions or the contemporaneous construction of the power of congress and the new states as evidenced by a course of legislation covering a period of over one hundred years, acquiesced in by the executive departments of the general government and states affected and so far supported by uniform judicial decision, except in the case of United States, ex rel, vs. United States Express Company, supra.

Mr. Justice Story, one of the greatest of text writers, as well as a great jurist, has laid down the doctrine for which we contend and we think his opinion upon a matter of the kind under consideration should receive great weight. His was the privilege of aiding very largely in properly settling subjects growing out of many of the constitutional provisions of our government which confronted the court in its early history.

Many of the authorities relied upon in support of the opinion of the majority of the court, offer but little, if any, aid for their contention. It is true that congress cannot, without the consent of the state, impose these obligations; it is true that the people of the state of Oklahoma in all respects, were they not bound by compact, would have the right to change the location of their state capital at this time, because that is a matter which is ordinarily a part of the legislative authority of a state government, and many of the cases cited and quoted from in the opinion of the court discuss these general principles, but if the court will carefully examine all of the cases which are relied upon, it will find that in no case has a court of the United States, with the exception above noted, given its assent to the abrogation of a contract either between states or between a new state and the United States, and we have shown by many authorities that these compacts are regarded, not only by the courts of the United States, but by the state courts, as being upon the same plane as contracts between nations, municipalities, and individuals.

Much of the discussion and authority relied upon grows out of the decision rendered in the case of Pollard's Lessee vs. Hagan, supra. That

case has been, in effect, we think, overruled, in so far as it relates to the matter here under consideration.

In United States vs. Winans, 198 U. S., 371, Mr. Justice McKenna, in delivering the opinion of the court, refers to what is termed in the opinion, as dicta, scattered through the case, which seems to assert a contrary view to that held by the court in United States vs. Winans, and quoting from Mr. Justice Gray, in Shively vs. Bowlby, 152 U. S., 1, the following significant language is used:

> "Notwithstanding the dicta contained in some of the opinions of the court already quoted, to the effect that congress has no power to grant any land below high water mark of navigable waters in a territory of the United States, it is evident that it is not strictly true."

And we believe that this contention to the effect, that congress and a proposed new state may not contract, grows very largely out of the dicta which has been scattered through many of the cases in discussing the relative status of the states and nation. The theory that all states are equal is evidently erroneous when considered in the light of the facts as they actually exist, because outside of the original thirteen

states, no two states of the Union which have been admitted under an enabling act are equal in the sense contended for. They have all been admitted under compacts waiving portions of their powers; in some instances to quite an extent, in others very little, in none have they failed to enter into the sisterhood of states upon an equality with the other states as relates to the general affairs of the government. They each have an equal representation in both houses of congress; they are each entitled to be heard in the national affairs of the government; the citizenship of each state is allowed to aid in the election of a president and to have federal courts, and the right to enter such courts for redress of wrong to the same extent as are the other states. There is nothing in the constitution of the United States which requires a new state to have all of the attributes of sovereignty which was possessed by the original states. There is nothing in such constitution which prevents the states from making any compacts involved in enabling acts. When congress admits a state into the Union, it frequently happens that a state is not ready for admission with all the local rights and privileges which inhere in the original states. Congress, on the one hand and the state on the other, agree, and permit

the state to enter into the Union as a state subject to certain limitations which, in the opinion of both congress and the state, are proper matters to be considered, and there is no good reason why a state may not be admitted, provided the state will agree to refrain from exercising its sovereignty in the matters which, in the opinion of congress and the state, the state is not in a position to act upon.

In the formation of the Federal Union, each of the original colonies, upon entering the Union, surrendered some of its sovereign powers, and deprived itself of the power to exercise others.

Each state which has come into the Union since the formation of the government of the United States has, either at the request or upon requirement of congress, temporarily or permanently deprived itself of the power to exercise some of the attributes of sovereignty. And by so doing the state has not been admitted upon an unequal footing with other states. Equality among the states, or as termed by the courts, an equal footing with the original states, means the possession of sovereignty, the power to exercise the functions of a republican form of government, not necessarily in the same manner or to the same extent.

Sovereignty is not a term whose meaning rests in loose popular opinion. It has a fixed meaning in the law, which is to be sought for in the writers on International Law, the utterances of statesmen, and the opinions of the courts. If a state possesses sovereign power as thus defined and understood, it stands upon an equal footing with other states whether it exercises such power or fails to exercise it.

The possession of sovereign power must of necessity involve the right to exercise or not to exercise such power. An agreement not to exercise sovereign power within a certain period or in a certain manner is an exercise of sovereignty itself. Sovereign power being the supreme power, it follows that the manner of its exercise or the exercise or non-exercise of it rests in sovereignty and is not subject to review by any other power. Each state possesses the sovereign right to repel invasion and suppress insurrection, yet it may never exercise it, either because the occasion never arises, or because in case of war it depends upon the national government to protect it. It waives its right to exercise this power in favor of the federal government. If a state possessing a sovereign attributue may voluntarily refrain from its exercise, what sound or logical reason can be ad-

vanced why it may not, if found expedient, agree to refrain from exercising it for a limited period as to some portion of its domain or people?

The State of Oklahoma has not been deprived of any right, has not been compelled to submit to any humiliation, has not been crippled in the exercise of any of the functions of government, has not been compelled to surrender any sovereign attribute. She was admitted into the Union upon an equal footing with the original states. She possesses the right to locate her state capital, the identical attribute of sovereignty which it is contended is lacking; but her people, in whom rest the sovereign power, have agreed in solemn compact by ordinance irrevocable, voluntarily adopted, that without the consent of congress, she will refrain from exercising such power until after 1913, and then will exercise such right only by a vote of the people.

There is no question of "states rights" in the case. The people of the proposed state exercised their rights when they adopted the ordinance irrevocable. There is no question of the power or right of congress to impose conditions. The congress submitted to the people of the two territories—one organized, the other without local government of any kind—a proposition for

their acceptance or rejection. Each elector was free in the exercise of his unrestricted sovereign power to accept or reject the terms. The consideration tendered was both great and valuable. It embraced five million dollars in cash as a donation for the benefit of public schools, millions of acres of valuable lands for educational and public building purposes; two members of the senate of the United States and five representatives in congress; the right in her people to exercise equal powers and prerogatives of every other citizen of the United States; the boon of statehood, with all its accompanying rights, powers, duties and obilgations.

The proposition submitted contained certain terms and conditions, which congress in its wisdom and in the exercise of its constitutional power to admit new states, saw fit to require the people to accept, if they desired to form a state and be admitted into the Union of States. The people freely, without compulsion, voluntarily, without coercion, accepted the terms proposed, received and accepted the bounteous consideration, and every principle of honor, of morals, of good faith, of law and justice, forbid that the state should nullify or repudiate the compact into which it so solemnly entered.

That eminent and profound jurist, Mr. Chief Justice Taney, in discussing another question, in Ableman vs. Booth, 21 How., 506, has appropriately said:

> "Nor is there anything in this supremacy of the general government, or the jurisdiction of its judicial tribunals, to awaken the jealousy or offend the natural and just pride of state sovereignty. Neither this government, nor the powers of which we are speaking, were forced upon the states. The constitution of the United States, with all the powers conferred by it on the general government, and surrendered by the states, was the voluntary act of the people of the several states, deliberately done, for their own protection and safety against injustice from one another. And their anxiety to preserve it in full force, in all its powers, and to guard against resistance to or evasion of its authority, on the part of a state, is proved by the clause which requires that the members of the state legislatures, and all executive and judicial officers of the several states (as well as those of the general government), shall be bound, by oath or affirmation, to support this constitution. This is the last and closing clause of the constitution, and inserted when the whole frame of government, with the powers hereinbefore specified, had been adopted by the

convention; and it was in that form, and with these powers, that the constitution was submitted to the people of the several states, for their consideration and decision.

Now, it certainly can be no humiliation to the citizens of a republic to yield a ready obedience to the laws as administered by the constituted authorities. On the contrary, it is among his first and highest duties as a citizen, because free government cannot exist without it. Nor can it be inconsistent with the dignity of a sovereign state, to observe faithfully, and in the spirit of sincerity and truth, the compact into which it voluntarily entered when it became a state of this Union. On the contrary, the highest honor of sovereignty is untarnished faith. And certainly no faith could be more deliberately and solemnly pledged than that which every state has plighted to the other states to support the constitution as it is, in all its provisions, until they shall be altered in the manner which the constitution itself prescribes. In the emphatic language of the pledge required, it is to support this constitution. And no power is more clearly conferred by the constitution and laws of the United States than the power of this court to decide, ultimately and finally, all cases arising under such constitution and laws; and for that purpose to bring here for revision,

by writ of error, the judgment of a state court, where such questions have arisen, and the right claimed under them denied by the highest judicial tribunal in the state."

The principle for which we are contending is in accord with the principles of international law laid down by eminent writers on that subject. Vattel says:

"Several sovereign and independent states may unite themselves together by a perpetual confederacy without ceasing to be, each individually, a perfect state. They will together constitute a federal republic; their joint deliberations will not impair the sovereignty of each member, though they may, in certain respects, put some restraint on the exercise of it, in virtue of voluntary engagements. A person does not cease to be free and independent, when he is obliged to fulfill engagements which he has voluntarily contracted."

Law of Nations, page 3.

Again:

"As a state that has put herself under the protection of another, has not on that account forfeited her character of sovereignty, she may make treaties and contract alliances unless she has in the treaty of protection, expressly renounced that right * * * * A treaty is valid if there be no

defect in the manner in which it has been concluded; and for this purpose nothing more can be required than a sufficient power in the contracting parties, and their mutual consent sufficiently declared." Page 193.

Under the head of unequal alliance, Vattel says:

"A treaty does not impair the sovereignty, if the weaker state only promises not to attack a certain nation without the consent of her ally. By such an engagement she neither divests herself of her right nor subjects the exertion of it to another's will; she incurs no greater diminution of liberty than is incurred by promises of every kind." (Page 2 (1).

In regard to the inviolability of treaties, Vattel says:

"Nations ought inviolably to observe their promises and their treaties. The great truth is generally acknowledged by all nations; the reproach of perfidy is esteemed by sovereigns a most atrocious affront, yet he who does not observe a treaty is certainly perfidious, since he violates his faith." (Page 196.)

"The faith of treaties—that firm and sincere resolution—that invariable constancy in fulfilling our engagements—of which we make profession in a treaty, is

therefore to be held sacred and inviolable between the nations of the earth. He who violates his treaties, violates at the same time, the law of nations; that faith which the law of nations declares sacred." (Page 229.)

We quote the following excerpts from Baker's International Law:

"A sovereign state may be defined to be one nation or people organized into a body politic and exercising the rights of self government." (Page 24.)

"The mere fact of dependence does not prevent a state from being regarded in international law, as a separate and distinct sovereignty, capable of enjoying the rights and incurring the obligations incident to that condition. * * * Nor is the sovereignty of a particular state necessarily destroyed by its mere nominal obedience to the commands of others, nor even by an habitual influence exercised by others over its councils." (Pages 25-26.)

"If a state parts with its rights of negotiations and treaty, and loses its essential attributes of independence, it can no longer be regarded as a sovereign state. Its legal status is not changed by a loss of relative power, but by a loss of the attributes of independence and sovereignty—the right to

exercise its volition and its capacity to contract obligations." (Page 27.)

"But the exercise of these rights may be limited by special compact freely entered into with other states. * * * All compacts when freely entered into, are binding, notwithstanding that they limit the natural rights of independent states." (Page 43.)

"The right of a state to negotiate and contract public treaties is a necessary incident to its sovereignty. The power exists in full vigor in every state which has not parted with this portion of its natural sovereignty. Sovereign states are sometimes restricted in their power to make new treaties by the conditions of alliances already formed with others. Such limitation affects the exercise of the power, but it is not regarded as affecting the power itself." (Page 94.)

It is alleged in the petition that the compact of the enabling act was entered into by the high contracting parties for good and sufficient reasons of state, which is all the consideration that is needed to support a public treaty, compact or convention. Of course in the present case there was a "consideration" in the ordinary sense of that term, but it was not necessary. Wheaton says:

"Inadequacy of consideration or inequality in the conditions of a treaty be-

tween nations such as might be regarded as sufficient to set aside a contract as between private individuals, do not form a sufficient reason for refusing to execute the treaty." International Law, page 377.

All the books lay down the rule that a consideration such as is required in private contracts, is not necessary in treaties and obligations of that character.

In Maxey's International Law, a late and very excellent work, the rule is summed up as follows:

> "A treaty in common with all other forms of contract, must have competent parties. Consent in the making of treaties need not be such as is necessary to the validity of contracts between individuals. Duress in the latter case renders the contract voidable, but not so in the case of treaties. Treaties made at the close of wars are usually made under duress. The question of consideration need not be considered in determining the validity of a treaty. As in the case of contracts of record, consideration is conclusively presumed." (Pages 26-27.)

In the Digest of International Law, Vol. 1, page 19, it is said:

> "The sovereignty of a state does not preclude the assumption of obligations by treaty or otherwise, or the existence of a servitude upon the territory of one state for the benefit of another."

In the old classical work of Grotius, these principles are announced in the same way:

> "Sovereignty is not destroyed by grants of rights from the sovereign. Authority does not cease to be sovereign, although the ruler makes certain promises to his subjects in matters relating to the government. The truth of this appears from the analogy of the master of a family who though he should have promised to do something which pertains to the government of the family, does not cease to have the supreme power in the family. Thus the Persian king was absolute and irresponsible; yet he took an oath on his ascension and could not change laws duly made." (Book 1, Chap. 3, Section 16.)

> "There is no partition of the sovereignty in cases where kings allow their own acts not to be valid except when approved by some assembly, for acts which are thus rescinded, are to be understood to be rescinded by the authority of the king." (Id. Sec. 18.)

In Matheny vs. Golden, 5 Ohio State, 368, there is a discussion of the principle under consideration. The case does not present a close analogy on the facts but the discussion of the court is very much in point. The Court said:

> "It is argued that if a state binds herself by a contract, to an exemption of a portion of the property within her limits and belonging to her citizens, from taxation, the power of taxation being an attribute of sovereignty, she thereby

surrenders a portion of her sovereignty, which in the nature of things,she cannot do. Now this argument overlooks the fact that the power to contract is also an attribute of sovereignty; without which a state so far from being a sovereign, would be on a level in legal capacity, with the minor and the lunitic. * * * But I deny that a s tate may not surrender a portion of her sovereignty. For a good and sufficient consideration states may do it; states have done it; and the whole line of history is dotted with examples of such surrenders."

That it has been the practice since the organization of the Federal Government for new states upon their admission into the Union to surrender or waive the exercise of some portion of their sovereignty is not only affirmed by text writers and judicial decisions, but an examination of the enabling acts conclusively demonistrates the proposition. The right to levy taxes, to raise revenues for the support and maintenance of the State governments is one of the most essential attributes of sovereignty. Deprive a State of this power and you destroy its power to carry on functions of government. It is purely a local political power, and yet this power has been frequently surrendered or temporarily suspended in the admission of new states.

The Enabling Act for the State of Ohio, approved April 30,1802, and accepted by the people of that State, contains this provision:

"Provided always, that the three foregoing propositions herein offered are on the conditions that the convention of the said State shall provide, by an ordinance irrevocable, without the consent of the United States, that every and each tract of land sold by Congress from and after the thirtieth day of June next, shall be and remain exempt from any tax laid by order or under authority of the State, whether for State, County, Township, or any other purpose whatever, for the term of five years from and after the day of sale."

In this instance the State as a condition to her right to admission, voluntarily surrendered her right to levy taxes upon certain lands for a period of five years after they would have been taxable, had it not been for her compact.

Indiana, admitted in 1816, by an ordinance irrevocable, accepted the requirement submitted by Congress and surrendered her power to levy taxes on certain lands for a period of five years after the United States passed the title to the individual owner.

Illinois, admitted in 1818, was deprived of the power to tax any lands sold by the United States for a period of five years after date of sale, and agreed not to tax any lands granted for military service, while held by the patentees for a period of three years after the issue of patent.

Louisiana, admitted in 1812, was required by Congress to conduct and record its legislative and judicial proceedings in the English language, and the state, by ordinance irrevocable, agreed not to levy any taxes against lands sold by the United States for a period of five years after sale, and that the Mississippi and navigable rivers leading into the Gulf of Mexico should be common highways forever free, and the State surrendered its right to impose any tax, duty, impost or toll for the use of the rivers as highways.

Michigan, admitted in 1837, waived her right to tax lands granted by the United States for military purposes until three years after date of patent.

Mississippi, admitted in 1817, surrendered her power to levy taxes on lands sold by the United States for a period of five years after date of sale.

Missouri, admitted in 1821, waived her right to tax lands sold by the United States for a period of five years after sale, as well as her right to tax lands granted for military services for three years after date of patent.

Arkansas, admitted in 1836, waived her right to tax bounty lands for a period of three years after issue of patent.

Alabama, admitted in 1819, by ordinance irrevocable, surrendered her right to tax lands sold by

the United States for a period of five years after date of sale, as well as the right to charge or collect tolls upon any of the navigable waters within the state.

Iowa, admitte din 1845, surrendered her right to tax bounty lands granted by Congress for military services, for a period of three years after patent.

Wisconsin, admitted in 1848, forever waived all right to tax the property of the United States, and agreed not to tax non-resident owners of property higher than residents. These waivers were also required of all the States having government property within their boundaries.

California, admitted in 1850, came into the Union upon the express condition imposed by Congress, that the people of the State should never interfere with the primary disposal of the public lands; that they would pass no law impairing the title of the United States to any of its lands; that they would never lay any tax or assessment upon the public domain of the United States; that they would never tax the property of non-residents higher than the property of residents, and that navigable waters within the State should forever be free to the inhabitants of the United States, and that they would never charge any impost or duty therefor.

Minnesota, admitted in 1858, was required to adopt an ordinance irrevocable, declaring that she

would never interfere with the primary disposal of the soil by the United States, or with any regulations Congress should find necessary for securing title to bona fide purchasers of the soil; that she would impose no tax upon the lands of the United States and would never tax the property of non-residents higher than property of residents.

Oregon, admitted in 1859, was required to consent to the same terms as those submitted to Minnesota.

Kansas, admitted in 1861, was among other conditions of admission prohibited from taxing the lands belonging to Indians within the State.

Nevada, admitted in 1864, was required as a condition of admission to provide by ordinance irrevocable without the consent of the United States, that there should be neither slavery or involuntary servitude in said state, except as a punishment for crime after due and legal conviction. That perfect toleration of religious sentiment should be secured, and that no inhabitant of the state should ever be molested in person or property on acount of his or her mode of religious worship, and in addition to the above, the same provisions as to public lands, taxation, etc., as required of Minnesota, Oregon and other states previously admitted.

Nebraska, admitted in 1867, was required by ordinance irrevocable to provide, that slavery and

involuntary servitude should be forever prohibited; that perfect toleration of religious sentiment should be secured; that no inhabitant of the United States should ever be molested in person or property on account of his or her mode of religious worship, to which was added the usual requirements as to property of the United States, protection of non-residents as to taxation; and later Congress, by a special act, required the State to provide as a fundamental condition that there should be no denial of the elective franchise or of any other right to any person by reason of race or color, excepting Indians not taxed.

Colorado, admitted in 1876, was required to consent to the same general conditions as the preceding states.

The States of Montana, Washington, North Dakota and South Dakota, were admitted in 1889, under a joint enabling act, which contains this provision:

> "And said convention shall provide, by ordinance irrevocable without the consent of the United States and the people of said states: First: That perfect toleration of religious sentiment shall be secured, and that no inhabitant of said states shall ever be molested in person or property on account of his or her mode of religious worship. Second: That the people inhabiting said proposed states do agree and declare

that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States; that the lands belonging to citizens of the United States residing without the said state shall never be taxed at a higher rate than the lands belonging to residents thereof; that no taxes shall be imposed by the states on lands or property therein belonging to or which may hereafter be purchased by the United States or reserved for its use. But nothing herein, or in the ordinances herein provided for, shall preclude the said states from taxing, as other lands are taxed, any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person a title thereto, by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of congress containing a provision exempting the lands thus granted from taxation; but said ordinances shall provide that all such lands shall be exempt from taxation by said states so long and to such extent as such act of congress may prescribe. Third: That the debts and liabilities of said ter-

ritories shall be assumed and paid by said states, respectively. Fourth: That provision shall be made for the establishment and maintenance of systems of public schools, which shall be open to all the children of said states and free from sectarian control."

Idaho, admitted in 1890, voluntaril adopted and submitted to the Congress of the United States with her constitution an ordinance irrevocable, containing these provisions:

"It is ordained by the State of Idaho, that perfect toleration of religious sentiment shall be secured, and no inhabitant of said State shall ever be molested in person or property on account of his or her mode of religious worship. And the people of the State of Idaho do agree and declare that we forever disclaim all right and title to the unappropriated pubic lands lying within the boundaries thereof, and to all lands lying within said limits, owned or held by any Indians or Indian tribes; and until the title thereto shall have been extinguished by the United States, the same shall be subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States; that the lands belonging to citizens of the United States, residing without the said State of Idaho, shall never be taxed at a higher rate than the lands belonging to the residents thereof. That no taxes shall be imposed by the

State on the lands or property therein belonging to, or which may hereafter be purchased by the United States, or reserved for its use. And the debts and liabilities of this Territory shall be assumed and paid by the State of Idaho. That this ordinance shall be irevocable, without the consent of the United States and the people of the State of Idaho."

This Court held in Dick vs. United States, 208 U. S. 340, 52 L. Ed. 520, that the treaty with the Nez Perce Indians forbidding the introduction of intoxicating liquors into the Indian country and providing that the Federal laws shoud remain in force for a period of twenty-five years and apply to the lands retained by the Indians or allotted to them in severalty, was a valid regulation, and was not an invasion of the sovereignty of the State of Idaho, which was by the Act of 1890, 26 Statutes at Large, 215, admitted into the Union on an equal footing with the other States. In this case Mr. Justice Harlan laid down certain fundamental principles in our governmental system, saying:

> "One is that a State, upon its admission into the Union, is thereafter upon an equal footing with every other State and has full and complete jurisdiction over all persons and things within its limits, except as it may be restrained by the provisions of the Federal Constitution or by its own Constitution."

This principle is a recognition of the rule for which we are contending, that is, that a state may by its own voluntary act in the exercise of its sovereign power, place its powers under restraint, or surrender the right to exercise some of its powers, and such action constitutes no invasion of its sovereignty,

The State of Wyoming submitted with her constitution an ordinance irevocable, voluntarily adopted, which was accepted by Congress when the State was admitted in 1890. The ordinance is as follows:

> "The State of Wyoming is an inseparable part of the Federal Union and the Constitution of the United States is the supreme law of the land.
>
> Sec. 2. Perfect toleration of religious sentiment shall be secured, and no inhabitant of this State shall ever be molested in person or property on account of his or her mode of religious worship.
>
> Sec. 3. The people inhabiting this State do agree and decare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes, and that until the title thereto shall have been extinguished by the United States the same shall be and remain subject to the disposition of the United States and that said Indian lands shall remain under the absolute jurisdiction and control of

the Congress of the United States; that the lands belonging to citizens of the United States residing without this State shall never be taxed at a higher rate than the lands belonging to residents of this State; that no taxes shall be imposed by this State on lands or property therein, belonging to, or which may hereafter be purchased by the United States, or reserved for its use. But nothing in this article shall preclude this State from taxing as other lands are taxed, any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person, a title thereto, by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any acts of Congress containing a provision exempting the lands thus granted from taxation, which last mentioned lands shall be exempt from taxation so long, and to such an extent, as is, or may be provided in the act of Congress granting the same.

Sec. 4. All debts and liabilities of the Territory of Wyoming shall be assumed and paid by this State.

Sec. 5. The legislature shall make laws for the estabishment and maintenance of systems of pubic schools which shall be open to all the children of the State and free from sectarian control."

It would seem to admit of no reasonable contention that if the people of a proposed state may voluntarily deprive themselves of the power to exercise some of their sovereign attributes, that it is no invasion of the sovereign powers of the people for Congress to submit similar propositions to the people in advance for their acceptance or rejection.

Utah, admitted in 1894, was required by the Enabling Act, by and through its constitutional convention, to provide by ordinance irrevocable without the consent of the United States and the people of said state:

> "That perfect toleration of religious sentiment shall be secured and no inhabitant of said State shall ever be molested in person or property on account of his or her mode of religious worship. Provided, That polygamous marriages are forever prohibited."

The further requirements are practically the same as those adopted by Wyoming.

If the decision of the Supreme Court of Oklahoma is sound, then it must follow that the people of the State of Utah are not bound by their solemn compact that they will forever prohibit polygamy in that State. The right to regulate the marriage relations, prohibit adultery and punish violations of marital obligations are within the political and police powers of the State, and if as a condition to the

admission of the State into the Union, Congress may not require the people in the exercise of their sovereignty to adopt a prescribed policy, then the policy of Congress for more than an hundred years, in dealing with new states, has been and is wrong, and must be reversed. Instead of being, as we have claimed, a progressive Nation, we must roll the wheels backward and admit that we are retrogressive.

The Oklahoma Enabling Act is in slightly different terms from those which have preceded it. Congress, instead of specifically designating the questions which the Constitutional Convention should adopt, in general terms, required:

> "That the Constitutional Convention provided for herein shall, by ordinance irrevocable, accept the terms and conditions of this Act." (34 Statutes at Large, 267.)

The Act referred to contains a number of "terms and conditions." It provides for perfect toleration of religious sentiment, prohibits polygamous and plural marriages, prevents the State from molesting any inhabitant in person or property on account of his or her mode of religous worship; prohibits the State from impairing the rights of person or property pertaining to the Indians; provides that the State shall not limit the authority of the United States to make any law or regulation respecting the Indians, their lands, property, rights, treaties,

agreements; requires the State to prohibit the manufacture, sale, barter, giving away or otherwise furnishing intoxicating liquors, within those parts of said State known as the Indian Territory, the Osage Indian Reservation, or other parts which existed as Indian reservations on January 1, 1906, for a period of twenty-one years after the date of the admission of the State; prohibiting the State from enacting any law restricting or abridging the right of suffrage on acount of race, color or previous condition of servitude; requiring the State to maintain a system of public schools open to all the children of the State free from sectarian control; requiring all public schools to be conducted in the English language, etc.

Another of the terms of the Act is the capital provision, which is the subject-matter of this controversy. The several enabling acts contain many provisions which have been fully executed or have become inoperative or obsolete, and numerous others which relate to the public lands, grants of lands to the States, and the conditions of such grants, the power of Congress over which has never been questioned. But in our review we have only referred to those which involve the exercise of purely political powers by the States, which in some degree more or less involve the waiver or surrender on the part of the people of the States of some attribute of state sovereignty.

We must assume that Congress has sufficient reasons to induce its actions. The Judiciary Committees of the two bodies are composed of the greatest lawyers and most conservative statesmen in the Nation. Congress has not only had a settled policy in dealing with this particular question, but it has been a progressive policy. The latest expression of this body is contained in the enabling acts for New Mexico and Arizona. New conditions are continually arising, new problems of government are being presented for safe and sane solution. New dangers are constantly taking root, which appear to menace republican institutions. Congress must meet these conditions, deal with the new problems and avert the dangers. Courts cannot inquire into the motives of the legislative department, but the courts may, in looking into the legislative power, not only look into the source of the power, but may look to the reasons which impel its operation. The New Mexico Enabling Act referred to, requires on the part of the State:

First. Perfect toleration of religious sentiment.

Second. Immunity from molestation on account of mode of religious worship.

Third. Prohibition of polygamous marriages or cohabitation.

Fourth. Prohibition of the sale, barter or giving of intoxicating liquors to Indians.

Fifth. Prohibition of the introduction of intoxicating liquors into the Indian country within the borders of said State.

Sixth. Disclaimer of all right and title in the lands belonging to the United States or to Indians or Indian tribes.

Seventh. Equality of taxation as between residents and non-residents of the State.

Eighth. The exemption of Indian lands from taxation.

Ninth. The assumption by the State of the debts of the Territory.

Tenth. Establishment of a system of public schools open to all the children of the State, free from sectarian control.

Eleventh. Requiring all public schools to be conducted in the English language.

Twelfth. Requiring ability to speak, read and write the English language as a qualification for all state officers and members of the legislature.

Thirteenth. Locating the state capital at Santa Fe until December 31, 1925.

Fourteenth. Requiring the state capital to be located by vote of the electors after 1925.

Fifteenth. Acquiescence in rights and reservations of the United States in reclamation projects.

Sixteenth. Prohibiting the introduction of intoxicating liquor upon lands allotted to Indians for

a period of twenty-five years after disposal of allotment.

Seventeenth. Prohibiting the state from amending or changing its constitution so as to abrogate any of the conditions imposed without the consent of Congress.

The Arizona Enabling Act contains similar terms and conditions.

We desire to refer briefly to some of the historical facts in relation to the exercise of sovereignty by the states in the location of their capitals, and their evident application to the case at bar. It must be conceded that the people of the proposed State of Oklahoma in the exercise of their latent sovereignty had the right to locate the temporary capital of the contemplated state. They had the right to exercise this power independent of any action of Congress. Does it make their action in agreeing not to exercise it any the less effective because Congress proposed a suspension of the exercise of this power? The right to exercise the power or not was left to the option of the people. They were free to accept or reject the proposition. The Enabling Act was only a proposition, not binding until accepted. When accepted, the proposal and the acceptance became a binding compact.

The power to temporarily locate the state capital and to fix a period during which the capital shall

not be removed is one which has been often exercised by the people of the states. If the people may for a period temporarily suspend their attribute of sovereignty in this respect by incorporating the limitation in the constitution, it must necessarily follow that they may suspend the power by any other action which will have binding force. The argument that the people cannot suspend or waive any of their attributes of sovereignty involving political or police powers is inconsistent with the history and formation of all states. The possession of sovereignty necessarily includes the right to exercise sovereignty. The right to exercise the power must *a fortiori* include the right to waive the exercise of the power. The possessor of the power may impose its own limitations upon its exercise so long as it does not deprive itself of the general exercise of those attributes which are required to be exercised in order to maintain a republican form of government. Constitutions are universally limitations upon sovereignty. If the exercise of this power may be permanently limited, as has been done since the formation of the Federal compact, then the exercise of some one or more of the attributes of sovereignty may be temporarily waived. This is the Oklahoma condition. The people of the state in the acceptance of the propositions submitted by Congress for their acceptance or rejection, temporarily waived the right to locate

their state capital. This is within their sovereign power and they exercised sovereign power when they adopted the Ordinance Irrevocable. It is now puerile and degrading to the dignity of the state to contend that the sovereign people of Oklahoma were coerced by the Federal Government. They were free to reject or to accept, and no power existed to compel, coerce or induce them to accept, except that which arose from their own desire to speedily grasp the boon of independent statehood. Congress is the sole power to admit new states. It may propose, and is the sole judge of the terms and conditions upon which states may be admitted. The Enabling Act presented the terms and conditions upon which Oklahoma could come into the Union of States. Congress delegated to the President the power of determining whether the constitution and ordinances submitted by Oklahoma constituted a compliance with the proposals submitted, and if he found such to be the fact, he was empowered to admit the state. But suppose, instead of finding a general compliance with all the terms and conditions of the proposal, the President should have found that the convention had rejected the proposition locating the temporary capital and accepted all the others. What would have been the result? The President would have referred the matter to the next Congress. There can be no doubt of

what would have been the result. This provision was not considered of sufficient weight or importance by the people of the state to warrant the months or more of delay that would have resulted in presenting the matter to Congress, and they voluntarily and freely accepted every term and condition imposed in the proposal, and were thereupon admitted, and time and experience has demonstrated the wisdom of every condition so imposed and accepted. Honor, morals, right, justice and good faith are all involved in the repudiation of our solemn compact. Courts universally uphold the honor, dignity and good faith of a state when it may be done without encroaching upon any of the sovereign rights of the people.

We have said if the people in the formation of a new or subsequent state constitution may limit their power to remove the state capital for a stated period, then it must follow that they may in the exercise of their sovereignty suspend or waive the same right by a compact with the United States. The power is the same in either case; it is an attribute of sovereignty in either case. If the people may "cripple" themselves by voluntarily fracturing a limb in one manner they may fracture it in some other manner, and the result is the same. If the right to be a "cripple" exists, the manner in which it effects the same result is immaterial.

An examination of the constitutions of the several states shows that a number of the states have "deprived themselves of the power to exercise the great function of locating or removing the permanent state capital for a fixed period," and yet we find no case where any court has held that by virtue of such action the sovereign people were degraded, disgraced and left powerless to defend against their enemies, foreign or domestic.

COLORADO.

The constitution of 1876, adopted by the people of Colorado, fixes the temporary seat of government at Denver, and prohibits the legislature from changing or locating the permanent seat of government. Provides that the first legislature after 1880 shall provide for submitting to the people the question of the permanent location at a general election, and a majority of all votes cast at such election shall be necessary to determine the location.

FLORIDA.

The constitution adopted by Florida in 1839 locates the seat of government at Tallahassee for a period of five years after the adjournment of the first legislature; provides for a change after five years, and a permanent location after expiration of ten years.

IDAHO.

The constitution of 1889 provides:

> "The seat of government of the State of Idaho shall be located at Boise City for twenty years from the admission of the state, after which the legislature may provide for its relocation by submitting the question to a vote of the electors at some general election."

INDIANA.

In 1816 Indiana adopted her first constitution and was admitted into the Union. This constitution located the seat of government at Corydon until the year 1825, and until removed by law. This place is on the Ohio river on the extreme southern border of the state, and the people suspended their power to remove for a period of nine years.

LOUISIANA.

The constitution of Louisiana of 1845 authorizes the first legislature to fix the seat of government at some place not less than sixty miles from New Orleans, and provides that it shall not thereafter be removed without the consent of four-fifths of both houses of legislature.

MICHIGAN.

The Michigan constitution of 1835 provides:

> "The seat of government for this State shall be at Detroit, or at such other place or places as

may be prescribed by law, until the year 1847, when it shall be permanently located by the legislature."

MONTANA.

The constitution of 1889 fixes temporary seat of government at Helena until permanent seat of government is located, prohibits the legislature from appropriating any money for capital until permanent seat of government is fixed, and authorizes legislature after the year 1890 to submit the question of permanent location to the electors at a general election. After the permanent location is fixed no change shall be made except upon a vote of two-thirds of all qualified electors.

NEVADA.

The Nevada constitution of 1864 provides:

"The seat of government shall be at Carson City, but no appropriation for the erection or purchase of capital buildings shall be made during the next three years."

OREGON.

The constitution of Oregon adopted in 1857 prohibits the legislature from establishing a permanent seat of government, but directs the first legislature elected under the constitution to submit the question of the permanent location to a vote of the people; prohibits the levy of any tax or expenditure of any

money for a state house for a period of eight years, and prohibits the removal of the seat of government after it has been located by a vote of the people for a period of twenty years from the time of its establishment. This state has by the exercise of her own power suspended her sovereign attribute to "locate her capital wherever the people may want it" for a period of twenty years, a much longer period than the people of Oklahoma in the exercise of the same power suspended their legislative function relating to the capital removal.

TENNESSEE.

By constitution adopted in 1796, the State of Tennessee declared:

> "Knoxville shall be the seat of government until the year 1802."

TEXAS, 1845.

Texas provided in her first constitution that the seat of government should remain at Austin until 1850, after which the permanent seat of government could be located by the people.

WASHINGTON. 1889.

The constitution of Washington prohibits the legislature from locating or changing the seat of government, fixes temporary seat of government at Olympia until people shall by a majority vote of all votes cast on the subject locate the permanent seat

of government, and prohibits any appropriation for capital buildings until the people have located the permanent capital in the manner specified in the constitution.

WYOMING, 1889.

The constitution fixes temporary seat of government at Cheyenne, prohibits legislature from locating or changing same for a period of ten years, after which the question of location must be submitted to the electors of the state for their determination.

It is apparent from the foregoing excerpts that it is no new procedure in organic legislation for a state to locate her temporary capital or even her permanent capital for a fixed period and divest herself of the power to take further action on such subject during the prohibited period. The right to exercise such power seems to have been questioned for the first time in the Okahoma case. The contention in this state grows, as we perceive it, out of a misconception of the nature of the legislature fixing our temporary capital. The mistake is made in assuming that Congress fixed our temporary capital, when in fact Congress proposed certain terms which the people of the state by their own sovereign acts accepted.

CONTEMPORARY AND DEPARTMENTAL INTERPRETATION, AND STARE DECISIS.

There is another principle of constitutional law which, while not to be pressed too hard, yet within bounds, is an appreciable factor in cases of constitutional interpretation. We have today, not merely the Constitution, but the Constitution plus one hundred years of national existence. The common objection to written constitutions is their inflexibility. Whatever the theory may be, in practice, they have not proven so rigid as was at one time supposed. Like all things, they are acted upon by time and yield to the trend of events. There is a destiny that shapes the ends of nations as of individuals and written constitutions, like other things, bear the impress of their environment. Hence, we find that some parts of our Constitution have been expanded, extended, projected, while other parts remain unaffected. It is not only conceivable, but certain, that if the framers of the Constitution could look upon their handiwork today, it would wear a different aspect from what it did when it left their hands. Parts of the instrument have varied their relations to other parts. What was insignificant, or apparently so ,has, in places, risen to importance. What was important, or seemed so, has become unimportant. Some things have been dropped out, others added. And what was meant to

endure for ages has not withstood the wear of a century. The point is that the constitution is not a dead thing, but one that is live and vital, obeying the principle of evolution as the condition of existence, and Professor Wigmore has set at the beginning of his Pocket Code of Evidence, these words of a distinguished member of this Court:

> "The law has got to be stated over again. And I venture to say that in fifty years we shall have it in a form of which no man could have dreamed fifty years ago."

There are three recognized sources of the law: Ancient custom and usage, statutes, and judicial interpretation, to which must be added, departmental interpretation. When the framers of the Constitution said that the Congress should have power to admit new states, they said all that was deemed needful on the subject. The Constitution may be searched in vain for any other expression bearing upon this power, save only the general clause that Congress may enact all laws necessary or proper for carrying into effect the provisions of the Constitution, and the further provision that Congress shall guarantee to each state a republican form of government. Aside from this no directions were given, no hints or suggestions made. The entire matter was committed to the wisdom and discretion of Congress, including, of course, the President, as a part of the law-making

power. The Courts announced the doctrine, a palpable truism, that new states when admitted, should be on an equal footing with the other states. The Constitution does not provide this, but the scheme of our government requires that it should be so. The question arises, What is a footing of equality, and who is to determine whether it exists? From the earliest days, Congress has assumed to determine these questions. We say assumed, although there is no assumption about it. Congress is plainly charged with the power and responsibility of admitting new states, without limitation or qualification. The end implies the means. But there is an express declaration that Congress shall have power to pass all laws that may be necessary and proper for carrying into effect the provisions of the Constitution, and generally speaking, Congress must determine what laws are necessary and proper. McCulloch v. Maryland, 4 Wheat 316. It was long contended, especially by the Anti-Federalist section of the people, that the courts could not declare any law whatever unconstitutional. In his letter to Judge Spencer Roane, Jefferson said:

> "In denying the right they (the judiciary) usurp of exclusively explaining the Constitution, I go further than you do, if I understand rightly your quotations from the Federalist, of an opinion that 'the judiciary is the last resort in rela-

tion to the other departments of the government, but not in relation to the rights of the parties to the compact under which the judiciary is derived.' If this opinion be sound, then indeed is our Constitution a complete *felo de se*. For intending to establish three departments, co-ordinate and independent, that they might check and balance one another, it has given, according to this opinion, to one of them aone, the right to prescribe rules for the government of the others, and that one, too, which is unelected by, and independent of the nation. For experience has already shown that the impeachment it has provided is not even a scare-crow; that such opinions as the one you combat, sent cautiously out, as you observe also, by detachment, not belonging to the case often, but sought for out of it, as if to rally the public opinion beforehand to their views, and to indicate the line they are to walk in, have been so quietly passed over as never to have excited animadversion, even in a speech of any one of the body intrusted with impeachment. The Constitution, on this hypothesis, is a mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they please. It should be remembered, as an axiom of eternal truth in politics, that whatever power in any government is independent, is absolute also; in theory only, at first, while the spirit of the people is up, but in practice, as fast as that relaxes. Independence can be trusted nowhere but with the people in mass.

> They are inherently independent of all but moral law. My construction of the Constitution is very different from that you quote. It is that each department is truly independent of the others, and has an equal right to decide for itself what is the meaning of the Constitution in the cases submitted to its action; and especially, where it is to act ultimately and without appeal."

Of course this doctrine is now exploded (an illustration of the point under discussion) and it is accepted constitutional doctrine that the Courts may say whether a law is valid. But it is equally settled that the Courts in any case, deal reluctantly with such questions and will not declare a law unconstitutional except in a plain case.

But there are no doubt cases which fall entirely without the province of the Court to examine into their validity or invalidity, cases of matters committed exclusively to one or other branch of the government and not of judicial cognizance. Treaties and relations with foreign powers, are examples. Perhaps all cases involving policies, and reasons of state, are examples.

Since the beginning of the government, Congress, in the exercise of its *supposed* powers, at least, has prescribed terms in the admission of states. This practice has become as well settled as it is possible

for a practice to become in that length of time. All but three states came in under conditions prescribed. In the Courts, one case makes a precedent, but here there are more than thirty. So far as the general proposition can be controlled by precedent, it is controlled. There are over thirty instances, and a hundred and twenty years of sanction behind it. This practice has been uniformly followed by Congress and the President, the two great co-ordinate branches of the government to which the question is committed. It is supported by the judgment of the great constitutional lawyers who have sat in Congress or occupied the presidential chair. It has been sanctioned by the people. The question is, Does not this subject fall within the domain that is withdrawn from judicial cognizance? May the Courts interfere in a matter which has been thus established and sanctioned? We think not. It seems to us that it is a case where the deference due from one department of the government to another forbids interference. It is peculiarly one of those matters mentioned by Jefferson "where the action of Congress is meant to be ultimate and without appeal."

But it is said that a provision of the kind in question destroys the equality which must exist between the States. That question was passed upon by Congress and the President, and by the people of the State. Is it now to be reviewed by the Court?

In approaching the consideration of a case like the present, it is essential to bear in mind that we have not a clean sheet to write upon. We cannot shut our eyes to history and the facts of our national existence. Upwards of thirty states have been admitted under the Constitution, and the circumstances and conditions of their admission must be examined. If, in doing this, we should find that no conditions were annexed to the admission of any state, this would be one thing. What we find is that in every instance, save three, conditions were imposed upon states in their admission. This constitutes a body of precedent which the Court is bound to look to. Examining these precedents with a view of deducing such principles as may be drawn from them, we find that Congress during the period of our national existence, has deemed it proper, and within the sphere of its constitutional power, to take note of and deal with local and temporary conditions in the admission of states. This practically establishes it as a principle that Congress has such power. In our opinion this power is one that is committed peculiarly to the discretion of Congress and the President. We do not think the Courts at this late day could go back over the ground and examine seriatim all the Enabling Acts of the States for the purpose of inquiring whether Congress had acted wisely, or had exceeded its mandate, in imposing conditions of admission in

given instances. If the facts were that in every instance heretofore Congress had admitted states without condition, it might with greater force be inquired how it is that in this instance and at this late day the practice is suddenly departed from? In nearly every instance some peculiar condition was presented that Congress deemed it proper to provide for. In Louisiana it was (inter alia) the French language and laws,—in Utah, polygamy, and so on with the other states. We do not think it is necessary to find a reason for the action of Congress in such cases. It is to be assumed, as the common law assumed a consideration for sealed instruments; and in the admission of new states it is to be assumed that high reasons of state are behind the action of Congress. In the case of Oklahoma a reason is not far to seek: Two territories were to be erected into a state. In one, there had been a territorial form of government for eighteen years; in the other none. One territory was largely settled by Indians, of whom five tribes had had a form of government of their own, but the conditions on the whole, were extraordinary, if not chaotic. 'Generally speaking, conditions were confused and unsettled. In Oklahoma proper, white settlement, and years of territorial government, had resulted in political organization, which was wanting in the Indian Territory. This want of organization in the Eastern part, seemed to place that section at a

disadvantage. Time was required for conditions to adjust themselves. It was a matter of common knowledge that when Oklahoma was organized as a territory, and the first legislature assembled to adopt a code of laws, the entire session, except the last three or four days, was taken up with the turmoil and scandals of a capital location fight, with the result that the code rushed through in the closing hours, was a thing to gaze upon with wonder and awe. Duplicate chapters on the same subject were torn at random from the statutes of different states and cast into the pot. There was a chapter on Conveyances, and in another place a chapter on Transfers, with conflicting provisions. There was a complete set of Navigation laws, requiring ships to show green lights on one side and red lights on the other. There were other absurdities which need not be particularized. There was bribery and corruption without limit, and finally there were animosities engendered which to this day retain their potency for evil in the State. These were some of the conditions which Congress presumably had in mind in providing for the admission of Oklahoma to statehod. In such circumstances, it does not require any straining after reasons to understand why Congress deemed it proper to provide in the Enabling Act for the temporary location of the seat of government. Congress is concerned with the welfare of the entire people. Considerations looking to the

protection of the Indians might well have entered into their deliberations on the subject. The unequal political conditions existing, or believed to exist, in the State might well have suggested a little holding back, that the belated section might catch up. And the elimination of unseemly scrambles over a capital location for a limited time, would obviously conduce to the welfare of the people, which Congress must be presumed to have had at heart in adopting the provisions of the Enabling Act. What Congress foresaw has, in a measure taken place in the State, notwithstanding the Enabling Act. We have had the spectacle of a governor maintaining his office away from the seat of government, in violation of the Constitution, and in defiance of the express decision of the highest Court of the State. We have had a special session of the legislature convened by the governor at a town not the seat of government, in violation of law, and a few days before the regular session would meet, because his term of office was about to expire, for the purpose of moving the capital to the town where the special session was convened, and the legislature assembled there that the members might be brought within the atmosphere and influence of the favored town. We have had al the adjuncts and concomitants of such a condition, which may be imagined and need not be specified. Congress sought

to obviate these conditions. That it had the right to do what it did and the people the right to concur therein, we have no doubt.

But it may be said, if the principle be once admitted where is the line to be drawn? If Congress may provide for the temporary location of the capital, may it not provide for the permanent location? This does not follow, because the two cases are different. Still it may be said that extreme cases may arise and that it would be dangerous to admit the principle. There are several answers to this. In the first place, it is not to be presumed that such cases will arise. In the second place, if they do, the people do not have to accept them. In the third place, it will be time to cross that bridge when we get to it. In Monongahela Bridge Company vs. the United States, 216 U. S. 195, this Court said:

> "Learned counsel for the defendant suggests some extreme cases, showing how reckless and arbitrary might be the action of executive officers proceeding under an act of Congress, the enforcement of which affects the enjoyment or value of private property. It will be time enough to deal with such cases when they arrive. Suffice it to say that the Courts have rarely, if ever felt themselves so restrained by technical rules that they could not find some remedy consistent with the law, for acts, whether done by the government or by individual persons, that

violated natural justice or were hostile to the fundamental principles devised for the protection of the essential rights of property."

There are always able and patriotic men in Congress, schooled and skilled in constitutional law, and the President is always a man of experience and high character. With such safeguards there is not much danger of serious encroachment upon the fundamental rights of the people. But even if there were, it is a defect which inheres in the frame of government and for which there is no help. Power always carries with it the possibility of abuse, and men have not been able to devise a better depository for it than the popular branch government. If it can not be trusted here, it can not be trusted anywhere. At any rate, this is the theory of republican governments, and the objection would not be obviated by transferring the power to some other department. It would still carry with it its inherent incidents and vicissitudes.

Stuart vs. Laird, 1 Cranch. 299-309.

Martin vs. Hunter, 1 Wheat. 304-351.

McCulloch vs. Maryland, 4 Wheat. 316-401.

Cohens vs. Virgina, 6 Wheat. 264-418.

Boyd vs. United States, 116 U. S. 616-622.

The Laura, 114 U. S. 411-416.

Field vs. Clark, 143 U. S. 649-691.

Meriwether vs. Garrett, 102 U. S. 472-515.

ilbourn vs. Thompson, 103 U. S. 168-191.

Mugler vs. Kansas, 123 U. S. 623-662.

McCray vs. United States, 195 U. S. 27.

HAS THE LEGISLATURE OF THE STATE THE POWER TO CREATE AN INDEBTEDNESS AT THIS TIME FOR THE PURPOSE OF LOCATING THE PERMANENT SEAT OF GOVERNMENT, WHICH MUST BE MET BY A LEVY OF TAXES?

A court of equity will by injunction protect against the imposition of taxes, and this has been decided in principle, we think, by a number of the States, and is in line with the law as laid down by various courts.

The People of New York vs. Canal Board of New York, 55 N. Y. 390:

> "Public bodies and public officers may be restrained by injunction from proceeding in violation of law to the prejudice of the public or to the injury of individual rights."

Griffith vs. Crawford County Commissioners, 1 Ohio, 457:

> "The illegal acts of public officers may be restrained by injunction."

Court vs. Boreman, 34 W. Va. 362-68; Williams vs. County, 26 W. Va. 488:

"A bill in equity may be brought in the name of the tax payers of the county to enjoin the county commissioners from the execution and delivery of a deed to real estate belonging to the county where there is involved an unjust burden upon the tax payers, or a squandering of the resources of the of the county, to replace which taxation must be levied."

McCord vs. Pike, et al., (Ill.) 12 N. E. 259.

To the same effect is the case of State, ex rel Taylor vs. Pennoyer (Oregon) 37 Pac. 906.

The petition in this case alleges in substance that the Plaintiff in Error is a tax payer of the State of Oklahoma; that the appointment of commissioners, with the attendant expenses of such commission, will create a burden of not less than $100,000 during the period for which such condition has been created; that this expenditure results directly from the location of the permanent capital of the State at this time.

This act upon the part of the legislature is prohibited in positive language by the provisions of the Enabling Act heretofore quoted; and it is our contention that the courts must, in the protection of the property rights of the Plaintiff in Error, enjoin the proposed expenditure of money.

In conclusion we assert:

1. That the Enabling Act and its acceptance by the people of the State of Oklahoma through their delegates to the Constitutional Convention, constitutes a binding compact between the State and the Nation.

2. Under the terms and conditions of the Enabling Act and the ordinance accepting the same, the legislature of the State of Oklahoma has no power to permanently locate the capital of the State, and that it must be so located by vote of the people.

3. The legislature of the State has not the power at this time to create an indebtedness for the purpose of locating the permanent seat of government, the expenses thereof or any part of the same, which must be met by a levy of taxes against the property of plaintiff and other tax payers of the State

For the reasons above assigned, it is respectfully submitted that the judgment of the Supreme Court of Oklahoma shoud be reversed and the cause remanded for further proceedings.

JOHN H. BURFORD.

FRANK DALE.

A. G. C. BIERER.

FRANK B. BURFORD.

C. G. HORNOR.

BENJ. F. HEGLER.

Attorneys for Plaintiff in Error.

No. 941.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1910.

WILLIAM H. COYLE, *Plaintiff in Error.*

vs.

THOMAS P. SMITH, Secretary of State of the State of Oklahoma, et al., *Defendants in Error.*

APPLICATION TO ADVANCE

Comes the plaintiff in Error, William H. Coyle, and prays the Court to advance this cause for argument and submission.

The case involves a question in which the United States is concerned, and affects a matter of general public interest. It involves the sovereignty of the United States and its power through Congress to enter into compacts with new states, as well as the power

to prescribe terms and conditions upon which a proposed state may be admitted into the Union.

The Act of Congress by which Oklahoma was admitted into the Union, among other conditions, provides that:

> "The capital of said State shall temporarily be at the City of Guthrie, in the present Territory of Oklahoma, and shall not be changed therefrom previous to Anno Domini Nineteen hundred and thirteen, but said capital shall, after said year, be located by the electors of said State at an election to be provided for by the legislature; *Provided, however,* that the legislature of said state, except as shall be necessary for the convenient transaction of the public business of said state at said capital, shall not appropriate any public moneys of the State for the erection of buildings for capitol purposes during such period."

34 Statutes at Large, 267.

The Act further provides, Section 22:

> "That the Constitutional Convention provided for herein shall, by ordinance irrevocable, accept the terms and conditions of this Act."
> Act approved June 16, 1906, 34 Statutes, 267.

The Constitutional Convention authorized by and convened under said Act of Congress did, on April 27, 1907, adopt an ordinance irrevocable, accepting all the terms and conditions of the Enabling Act. This ordinance was duly engrossed and an engrossed copy transmitted to the President, with the copy of the Constitution transmitted for his approval.

The legislature of the State on December 29, 1910, passed a law locating the State capital and seat of government at Oklahoma City, and authorized the construction of a capitol building, and also at the same session enacted a law authorizing any tax payer to bring an action in the Supreme Court of the State to test the legality of the capital removal act. The State offices were, pursuant to said act, removed from Guthrie to Oklahoma City, and all official acts of the several departments of the State are now performed at said place.

The Plaintiff in Error, under the authority given in said statute, immediately upon the passage of said state statute, brought suit in the Supreme Court of the State to enjoin the several state officers from removing their several offices from Guthrie, in which suit he set up the Act of Congress as a valid act and alleged that the State statute was repugnant thereto and therefore void.

The State Constitution requires all State officers to hold their offices at the seat of government. The contention of Plaintiff in Error was:

First. That the conditions of the Enabling Act, accepted by the people of the proposed State, through the ordinance irrevocable adopted by the Constitutional Convention, constitutes a compact between the United States and the State of Oklahoma which the State legislature cannot abrogate without the consent of Congress.

Second. That the terms and provisions of the

Enabling Act were propositions submitted by Congress to the people of the proposed state which they might, acting in their sovereign capacity, voluntarily accept or reject, and having accepted the same, the legislature of the State has no power to nullify any of said terms.

Third. That the conditions of the Enabling Act, accepted by ordinance irrevocable, become fundamental law and cannot be repealed by the legislature.

Green vs. Biddle, 8 Wheat., 1;

Spooner vs. McConnell, et al., 1 McClain, 337;

White vs. Hart, 13 Wall., 636;

Brittle vs. People, 2 Nebr., 198.

The Supreme Court of the State after lengthy argument and exhaustive research, by a divided Court, three to two, decided that the location of the State capital involves the exercise of the political powers of the State, and that Congress has no power to impose any conditions or limitations upon the exercise of such power.

The judgment of the Court denies the validity of the Act of Congress and declares it void, while it upholds the validity of the State statute, which it is claimed is repugnant to the terms of the Enabling Act. The case is here on writ of error from the final judgment of the highest court of the State.

The decision of the State Court is far-reaching.

If sound, it overturns the practice of Congress in dealing with every state admitted in the past century.

This decision not only declares the capital provision void, but in effect nullifies the provisions of the Oklahoma Enabling Act, which prohibits the State from making any appropriation of the State's revenues for the construction of a permanent capitol building until after the year 1913; which prohibits polygamous or plural marriages; that requires the State to prohibit the sale, manufacture of and traffic in intoxicating liquors in that portion of the State known as Indian Territory for a period of twenty-one years; which prescribes that property of non-residents shall not be taxed higher than that of residents; that no taxes shall be levied upon the property of the United States; that the public school shall be free from sectarian control and conducted in the English language; that the State shall never enact any law restricting or abridging the right of suffrage on account of race, color or previous condition of servitude.

If the decision in this case is the law, then the provisions in the Enabling Act admitting Utah as a State; which requires perfect toleration of religious sentiment and secures to every inhabitant of the state immunity from molestation on account of his or her mode of religious worship; that forever prohibits polygamous or plural marriages; that requires public schools to be established, open to all the children of the State, and free from sectarian control,

are in excess of the power of Congress to impose, and are void.

The decision abrogates the provision of the Enabling Acts of Montana, North Dakota, South Dakota and Nevada, requiring perfect toleration of religious sentiment and guaranteeing to the inhabitants of said States immunity from molestation in person or property on account of their mode of religious worship.

The Enabling Act of New Mexico, the latest expression of the Congress of the United States upon the subject-matter, determined by the Oklahoma Supreme Court, contains the following terms and conditions consented to by the people of said proposed State, all of which are in excess of the power of Congress to require, and are ineffectual if the law as laid down by the Oklahoma Supreme Court is sound:

First. Perfect toleration of religious sentiment.

Second. Immunity from molestation on account of mode of religious worship.

Third: Prohibition of polygamous marriages or cohabitation.

Fourth: Prohibition of the sale, barter or giving of intoxicating liquors to Indians.

Fifth: Prohibition of the introduction of intoxicating liquors into the Indian country within the borders of said State.

Sixth: Disclaimer of all right and title in the lands belonging to the United States or to Indians or Indian tribes.

Seventh: Equality of taxation as between residents and non-residents of the State.

Eighth: The exemption of Indian lands from taxation.

Ninth: The assumption by the State of the debts of the Territory.

Tenth: Establishment of a system of public schools open to all the children of the State, free from sectarian control.

Eleventh: Requiring all public schools to be conducted in the English language.

Twelfth: Requiring ability to speak, read and write the English language as a qualification for all state officers and members of the legislature.

Thirteenth: Locating the state capital at Santa Fe until December 31, 1925.

Fourteenth: Requiring the state capital to be located by vote of the electors after 1925.

Fifteenth: Acquiescence in rights and reservations of the United States in reclamation projects.

Sixteenth: Prohibiting the introduction of intoxicating liquor upon lands allotted to Indians for a period of twenty-five years after disposal of allotment.

Seventeenth: Prohibiting the state from amending or changing its constitution so as to abrogate any of the conditions imposed without the consent of Congress.

The Arizona Enabling Act contains similar terms, conditions and provisions.

The Louisiana Enabling Act requires that the laws of the State, its records and legislative and judicial proceedings shall be preserved, conducted and published in the English language.

The foregoing are only a portion of the Congressional requirements which will be invalidated by the rule anounced by the Oklahoma Supreme Court. These suggestions show the far-reaching effect of this decision, and the subjects affected are those which interest and appeal to every citizen of the United States.

The case should be advanced for the further reason that if the Act of Congress is binding, then the executive, legislative and judicial departments of the State government are now conducting the governmental functions and transacting the public business at a place which is not the seat of government, while the Constitution of the State specifically requires all these acts to be performed at the seat of government. If our legislative acts, judgments and decrees of the courts and acts of the executive officers and departments are void, or even clouded, the results are so appalling and widespread as to affect the general public throughout the entire United States.

To fail to advance this cause means that the case will not be disposed of prior to 1913, the date when the Congressional limitation as to location of the state capital will expire; and the confusion and uncertainty now attending all public acts in the State will continue during a further period of two years.

To await the regular course of business in this Court for a determination of this cause will result in the subject-matter of the case being disposed of by limitation before it is reached in course.

The State statute which is the subject of attack and which violates and repudiates the Act of Congress was approved December 29, 1910. This cause was filed on the —— day of January, 1911, and final judgment was rendered by the Supreme Court of Oklahoma on February 9th, 1911. The case was brought to this Court by writ of error as speedily as the practice and procedure would reasonably permit, and an early determination is, we confidently assert, of supreme public importance. We respectfully pray that an order be made advancing said cause for argument and submission at the earliest practicable date.

FRANK DALE,
C. G. HORNOR,
A. G. C. BIERER,
JOHN H. BURFORD,
FRANK B. BURFORD,
BEN F. HEGLER,
Attorneys for Plaintiff in Error.

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WILLIAM H. COYLE
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THOMAS P. SMITH, Secretary of State of Oklahoma, et al
Defendants in Error

No. 941

IN ERROR TO THE SUPREME COURT OF OKLAHOMA

BRIEF OF THE ARGUMENT FOR DEFENDANT IN ERROR.

NO FEDERAL QUESTION.

So much of the contentions of the plaintiff in error, made below, which are urged here are summarized on pages 3 to 4 of his application to advance the case. Digested, they are:

1. The Oklahoma Enabling Act constitutes a compact between the State and the United States as to the matter of the location of the capital.

2. The people of Oklahoma had the power of rejecting the compact.

3. This condition, so accepted by the ordinance, is fundamental law and not repealable by the Legislature.

Our first question is, which of these, if any, is a federal question?

It is true that, at page 4 of his application to advance, he says that the supreme court of the state decided that Congress had no right to impose any conditions or limitations on the exercise by the state of the political power of locating its capital. It is true that, on the same page, he says that the judgment of the court, that is, the state court, denied the validity of the act of Congress and declared it void. To analyze his three propositions, let us consider all of them.

The Congress of the United States is supreme within the sphere of its authority. It is supreme in enacting a law for the United States within the scope of that authority, vested in it by the Constitution, but we suggest that the enactment of a law outside of the authority vested in it by the Constitution is, in all respects, a nullity. The Congress of the United States and the foreign nations may, acting together, agree upon a treaty, which then binds each country

with the force, and that only, which treaties possess, that is, the moral force of good faith. But in the first head, plaintiff in error says that the conditions of this act constitute a compact. What authority either Congress or the state had for making a compact is not shown, but if it is a compact, that means that the will of each side was necessary. There must have been a meeting of the minds. From this it must be deduced, that the conditions of the Enabling Act, if it is a compact, cannot rest upon the authority of Congress alone, but support for the compact must be found in the ordinance irrevocable. It would seem that there is no contention that the ordinance irrevocable was a federal act or that the ordinance irrevocable was a part of the Constitution, the laws, or the treaties of the United States. If so, it would seem that a necessary part of the compact must be sought outside of the federal authority—in other words, that the authority for these conditions cannot be found in federal law alone, and that it is not a case where the Congress of the United States legislated to the effect that the capital should remain at Guthrie until 1913, but it is a case in which the Congress said that that effect should follow provided the Constitutional Convention should so decree by an ordinance irrevocable. From this it would follow that the vitality of the provision proceeds from the ordinance irrevocable and not from the act of Congress, and that, therefore, the question involved is not a federal question at all.

If we now analyze the terms of the second position asserted by the plaintiff in error at the bottom of page 3 and the top of page 4 of his motion to advance, it is directly asserted that the people of the state, acting in their sovereign capacity, had the authority to reject. If the people of the state might reject these conditions, the force of the conditions is to be found in the will of the people of the state—not in the will of the people of the United States—and thus the question is not a federal question.

Furthermore, the second position is inconsistent with the first position. The first position says that the condition is a compact made between the Constitutional Convention, through its ordinance, and the United States, acting through Congress. The second position says that the conditions might have been rejected by the people, that they were proposed by Congress to the people, and that the people have accepted. In other words, the statement that the Convention, by its ordinance accepted, contained in the first, is apparently denied by the statement contained in the second, that the people, acting in their sovereign capacity, might voluntarily either accept or reject the condition. This is important because the ordinance was not submitted to a vote of the people.

The third position assumed is that the conditions of the Enabling Act accepted by the ordinance became the fundamental law and cannot be repealed by the Legislature. Whether this means the fundamental law in the sense that

it is a part of the Constitution of the state, it is plain that this does not mean that the condition became a part of the federal law by reason of the provisions of the ordinance irrevocable. It is certain that the will of Congress, within its proper scope is not subject to the ratification of a Constitutional Convention of a state; and, therefore, the position must mean that the conditions of the Enabling Act, being accepted by the ordinance irrevocable, became a fundamental part of the law of the state. If so, it is a state question. It will be borne in mind that, in the dissenting opinion of Mr. Justice Dunn, the position was taken that the ordinance irrevocable made the condition a part of the Constitution which the people of the state might, by a constitutional amendment, modify, but which the Legislature could not modify. If Mr. Justice Dunn is right, a state question only is involved.

In the dissenting opinion of Mr. Justice Kane the condition of the Enabling Act was considered a compact between the people of the United States and of the state, proposed by Congress and accepted by the Constitutional Convention for the people in the passage of the ordinance irrevocable. Upon the first hearing Judges Williams, Hayes, Dunn and Kane agreed that the matter was one which could be examined by the court (State *ex rel.* Attorney General vs. Huston, District Judge, 113 Pac. 190). It will be noticed that Turner, J., concurred in the conclusion that the Governor could not be compelled, but otherwise dissented.

The position of the state in that case was that the matter pending in the district court was one involving the political activities of the officials of the State of Oklahoma, which were not subject to review before the courts, and also that the state court overruled this position, but held that they were without power to enforce their decrees as against the Governor.

It, therefore, appears that when the case pending in the district court was appealed to the supreme court of the state under the name of Thomas P. Smith, Secretary of State, vs. State, *ex rel.* Hepburn, *et al.*, No. 1931 (unreported). The opinion of the court, which was written by Turner, J., concurred in by Justices Hayes, Dunn and Williams, rested first upon the assertion that Congress was without power to impose the condition and the state was without power to consent to the condition locating the capital of the state at Guthrie until the year 1913, and also upon the proposition that the law initiated to change the capital was not legally submitted. Kane, J., concurred in the conclusion, but upon the special ground that the condition of the Enabling Act locating the capital, being accepted by the ordinance irrevocable, became a compact between the United States and the people of the proposed state. When the matter was examined for the trird time in the case now before the court, that of Coyle vs. Smith, et al., the opinion was written by Williams, J., and concurred in by Turner, C. J., and Hayes J., dissents by Dunn, J., on the ground that the people only,

not the Legislature, could change the location of the capital, and Kane, J., on the ground that an inviolable compact had been made.

THE COMPACT THEORY.

If there is no federal question involved it is unnecessary to determine whether the lower court was right or wrong in its conclusions. It is apparent that Williams and Hayes, Justices, are in apparent agreement throughout; that Turner, C. J., agrees with Williams and Hayes, JJ., but, previous to the passage of the special Oklahoma law upon which this case depends, was of the opinion that the court was without authority to examine into the question; that Kane, J., has regarded the condition of the enabling act as a compact; that Dunn, J., regards the condition of the enabling act as a part of the fundamental law of the state. Everyone involved, both the court, counsel for the plaintiff in error and for the defendant in error, agree that this law is not an ordinary act of congress, which derives its power from the authority of the congress of the United States to deal with the subject in hand.

The function that the Enabling Act performs in this regard should be examined. A simular subject was

considered by this court in Pollard's Lessee vs. Hagan et al., 3 How. 212. In the body of the opinion, at page 224, Mr. Justice McKinley, speaking for this court upon the question of the power of the United States to dispose of lands within the State of Alabama below high water mark in the bed of a river therein, referred to the fact that, in the enabling act, the people of the State of Alabama had been required by Congress to disclaim all of certain rights and, in accordance with the requirement, had made such disclaimer, and he says that in that case it was claimed that the disclaimer could not operate as a contract between the state and the United States, but is binding as a law. Directing his argument to this question, he said:

> "Full power is given to Congress 'to make all needful rules and regulations respecting the territory or other property of the United States.' This authorized the passage of all laws necessary to secure the rights of the United States to the public lands, and to provide for their sale, and to protect them from taxation.
>
> "And all constitutional laws are binding on the people, in the new states and the old ones, whether they consent to be bound by them ar not. Every constitutional act of Congress is passed by the will of the people of the United States, expressed through their representatives, on the subject-matter of the enactment; and when so passed it becomes the supreme law of the land, and operates by its own force on the subject-matter, in whatever state or territory it may happen to be. The proposition, therefore, that such a law cannot operate upon the subject- matter of its enactment, without the express consent of the people of the new state where it

may happen to be, contains its own refutation, and requires no further examination. The propositions submitted to the people of the Alabama territory, for their acceptance or rejection, by the act of Congress authorizing them to form a constitution and state government for themselves, so far as they related to the public lands within that territory, amounted to nothing more nor less than rules and regulations respecting the sales and disposition of the public lands. The supposed compact relied on by the counsel for the plaintiffs, conferred no authority, therefore, on Congress to pass the act granting to the plaintiffs the land in controversy."

I know of no other or different statement as to the purpose or effect of such provisions in an enabling act. Our position is that everything in the enabling act which was within the sphere of congressional legislation was binding upon the people of Oklahoma as all the rest of the United States—not because of any ordinance, or not because of any acceptance or rejection at the polls, or not because of the admission of the state into the Union, but simply because the Congress had the authority in the premises.

At pages 5, 6, 7 and 8 of the application to advance, the supposed inconveniences which will result from an affirmance of the decision of the lower court are set out. Our answer to this is, first, that the argument *ab inconvenienti* is not a strong argument, though an admissible argument. Our next answer is that, as to the effect of an affirmance of this case upon the other questions, the court should consider them when they arise, as was recently said in respect to a

similar subject in the Noble State Bank case, but whatever Congress has provided in the enabling act which was within the scope of its power, cannot fall because of this decision. For instance, we suggest that the provision as to prohibiting traffic in liquor in what was the Indian Territory and other reservations in Oklahoma Territory was a proper exercise of the power of Congress under its authority to deal with commerce with the Indian tribes; that the question of the taxation of the property of non-residents should be decided by a reference to the Fourteenth Amendment; and that the provision in regard to the suffrage would came under the same question; the suggestion as to polygamous marriages is purely hypothetical; the suggestion as to toleration of religious sentiment is apparently included within that provision of the constitution which requires each state to have a republican form of government; that the same provision probably bars the schools from sectarian control; and that the court in this case should not consider any of the questions but the particular one here raised.

The conclusion of the court in the Pollard case was dissented from by Mr. Justice Catron, but in his dissenting opinion are statements which are very persuasive of the correctness of the decision of the Oklahoma court in this case. Mr. Justice Catron suggested that the matter should be settled by the political departments of the state and federal government—that the state was not complaining, and, therefore, that they should not listen to the complaints of an

individual. So in this case the United States is not complaining, and the complaint of the individual should not be heard. The question here is, as there, one to be settled by the political departments of the government. This becomes the more clear in the opinion of Permoli vs. First Municipality, 3 How. 588, in which the opinion of the court was rendered by Mr. Justice Catron. In that case it was claimed that the ordinance of 1787 for the Northwest Territory provided certain civil and religious liberties; that the act of Congress of 1805, Chapter 83, provided for the Orleans Territory the same rights and advantages secured to the inhabitants of the Northwest Territory by the ordinance of 1787; that by the act of February 20, 1811, authorizing the people of the Territory of Orleans to form a constitution and state government, provided that it should contain the fundamental principles of civil and religious liberty; that by the act of Congress of April 8, 1812, Louisiana was admited as a state upon the terms and conditions contained in the act of 1811, and it was asserted that this established for an inhabitant of the State of Louisiana a federal right to civil and religious liberty as against an ordinance of the First Municipality. In speaking of the enabling act of Louisiana, at page 609, Mr. Justice Catron said, in regard to the terms and conditions imposed by the enabling act:

> "All Congress intended, was to declare in advance, to the people of the territory, the fundamental principles their constitution should contain; this was every way proper under the circumstances; the instrument

having been duly formed and presented, it was for the national legislature to judge whether it contained the proper principles, and to accept it if it did, or reject it if it did not. Having accepted the constitution and admitted the state, 'on an equal footing with the original states in all respects whatever,' in express terms, by the act of 1812, Congress was concluded from assuming that the instructions contained in the act of 1811 had not been complied with. No fundamental principles could be added by way of amendment, as this would have been making part of the state constitution; if Congress could make it in part, it might, in the form of amendment, make it entire."

This is a direct assertion that Congress cannot, proceeding from its own authoriy, enact the law of the State of Oklahoma, except the federal law in that state, which is likewise in force in all other states. Further on page 610, Mr. Justice Catron said:

"In the ordinance there are terms of compact declared to be thereby established, between the original states, and the people in the states afterwards to be formed northwest of the Ohio, unalterable, unless by common consent * * * For this provision is claimed the sanction of an unalterable law of Congress; and it is insisted the city ordinances above have violated it; and what the force of the ordinance is north of the Ohio, we do not pretend to say, as it is unnecessary for the purpose of this case. But as regards the State of Louisiana, it had no further force, after the adoption of the state constitution, than other acts of Congress organizing, in part, the territorial government of Orleans, and standing in connection with the ordinance of 1787. So far as they conferred political rights, and

secured civil and religious liberties (which are political rights), the laws of Congress were all superseded by the state constitution; nor is any part of them in force, unless they were adopted by the constitution of Louisiana, as laws of the state. It is not possible to maintain that the United States hold in trust, by force of the ordinance, for the people of Louisiana, all the great elemental principles, or any one of them, contained in the ordinance, and secured to the people of the Orleans territory, during its existence. * * * The question presented by the record is exclusively of state cognizance * * *."

As these decisions of this court have, so far as I know, never been departed from on these questions, it would appear that all of the provisions of the enabling act are but commands to the people of the state and its convention—that in order for them to have the force and effect of law, the commands must be obeyed. If it is disobeyed, Congress had the authority to reject the state. If it is obeyed, still Congress would have the authority to reject the state. But when the state is once admitted, the force of the law proceeds, not from the act of Congress, but from the state law enforcing it. Therefore, the compact is without force. The federal enabling act is in this matter without force, and all that is in force is the state law presenting a matter of state cognizance not reviewable in this court. The case of Menard vs. Aspasia, 5 Peters, 505, presents in some respects the same question.

FEDERAL LAWS DEALING WITH LOCAL AFFAIRS SUSPENDED BY STATEHOOD.

The theory which Pollard's v. Hagan and Permoli v. First Municipality announce as to enabling acts has always been the rule of this court, as far as I know, in reference to all laws of the United States, which are not strictly for federal purposes, as distinguished from local or state purposes. That is, the laws of the United States which could be of force in a territory, but would not be within the sphere of federal domain in a state, are always held to be in effect *ex proprio vigore* while the territorial condition lasts, but after the advent of statehood are held to be suspended, unless perpetuated by state law, either re-enacting them in words, or by reference.

While it is true that Section 2 of the schedule of the Oklahoma constitution puts in force in Oklahoma all laws in force in the Territory of Oklahoma, not repugnant to the Constitution and which are applicable, unless they have been amended, repealed or modified; and while it is true this section of the schedule would put in effect federal laws for the Territory of Oklahoma, as well as territorial laws for that territory, yet laws so put in effect, that is, by the second section of the schedule of the constitution, would be state laws and not federal laws, and for their breach no federal right would arise.

In the case of New Orleans v. De Armas et al., 9 Pet. 224, the question was whether a title to property, which existed at the date of the treaty, continued to be protected by the treaty after the State of Louisiana was admitted to the Union. The third article of the treaty was relied on. Mr. Chief Justice Marshall said:

> "This article obviously contemplates two objects,. One, that Louisiana shall be admitted into the Union as soon as possible, on an equal footing with the other States; and the other, that, till such admission, the inhabitants of the ceded Territory shall be protected in the free enjoyment of their liberty, property and religion. Had any one of these rights been violated, while these stipulations continued in force, the individual supposing himself to be injured might have brought his case into this court under the 25th section of the Judicial Act. But this stipulation ceased to operate when Louisiana became a member of the Union, and its inhabitants were 'admtited to the enjoyment of all the rights, advantages and immunities of citizens of the United States.'"

If a solemn treaty of the United States made with the French Republic for the benefit of the people of the Louisiana Purchase, in so far as it affects their local concerns, is suspended upon the advent of statehood, what justification can be found that would give a greater solemnity to a compact made between the United States and a State, particularly where the United States is not complaining?

The reasoning of the great Chief Justice was in accord

with that of this court expressed through Mr. Justice M'Lean in the case of

Menard v. Aspasia, 5 Pet. 505.

The court will remember that Aspasia was a slave whom Menard claimed to own. The action was brought for her recovery. She was a negro woman, born in Illinois after July 13, 1787, and sent to Missouri as a slave. She was held to be free, and it was claimed that the ordinance of 1787 in that it guaranteed the continuance of such rights as existed upon its passage, which was understood to include the right to own slaves, that out of this ordinance grew the federal right to hold her as a slave. The court will notice that the ordinance of 1787 also guaranteed liberty. In any event, from either the contention of the plaintiff or the defendant, it was necessary to construe the ordinance of 1787, and it was claimed that the Missouri court had misconstrued it, had denied a right claimed under it, and the federal right thus arose. It was said, however, that while a large part of the ordinance was the law in Illinois, that it was so by reason of the fact that the Constitution of Illinois had re-enacted most if not all of the terms of the ordinance, and that the ordinance as local law in Illinois, and elsewhere in the northwest territory, ceased its operation upon the admission of the state into the Union, where the question of the operation of the law arose, and that thus there was no federal question involved.

While in the *De Armas Case,* the great Chief Justice does not mention the *Aspasia Case,* it follows in the wake of the opinion by Mr. Justice M'Lain, and later, in the case of

Choteau v. Marguerite, 12 Pet. 507,

the *Aspasia Case* and the *De Armas Case* were relied upon successfully, and though in the opinion of Mr. Justice Story a reason for the order is not shown, the order being that of dismissal, the notes of the reporter are to this effect:

> "Jurisdiction. The Supreme Court has not jurisdiction of a case brought by a writ of error from the Supreme Court of the State of Mississippi, under the 25th section of the Judiciary Act, where the question was whether the appellee was a slave. The provisions of the treaty by which Louisiana was ceded to the United States, and in which was a guaranty of the property of persons residing at the time of the cession within the Territory of Louisiana, may be enforced in the courts of the State of Missouri. The allegation that the treaty has been misconstrued by the Supreme Court of the State in refusing to sanction the claim asserted, will not give the Supreme Court of the United States jurisdiction in the case."

It would thus appear to be settled that after statehood the Enabling Act can have no force and effect as to local state matters in Oklahoma in its character as a law of Congress, and from the Permoli and Pollard's cases, it appears that such provisions can have no effect as a compact.

ONLY THE UNITED STATES CAN COMPLAIN OF THE BREACH.

The position of the plaintiff in error in relying upon the Enabling Act, not as law but as compact, appears so definitely from his application to advance the case, (pp. 3 and 4), that I have assumed it as the only position upon which he sought to stand.

Further, in his brief at pp. 6 and 7, it appears that he still stands upon it as a compact. At page 9 he speaks of it as an "agreement, compact or contract." He says on page 10:

> "Each side having authority to act, they together formulated a compact, under which the people of Oklahoma should enter, upon terms of equality, the sisterhood of states. Upon the one side, the people of the United States with full power to grant or deny, upon the other, the people of Oklahoma with the right to accept or reject."

If it is a compact, then, under familiar rules, only those persons who are privies to the contract can sue for its breach.

A case in point is

> Walsh v. Columbus, Hocking Valley and Athens Railroad Company, 176 U. S. 469.

Here there was an Act of Congress granting to the State of

Ohio a quantity of land for the construction of canals. The State granted their use to a railroad, and it was held that a private property owner was no party to the contract between the state and the federal government, and stood in no position to take advantage of a default of the state in respect to its contract; that his rights were entirely subsidiary to those of the government, and if the latter chose to acquiesce in the abandonment of the canals, he had no right to complain. In that case a motion was made to dismiss the writ of error for want of a federal question.

In reaching its conclusion the court referred to the case of Grinnell v. Railroad Company, 103 U. S. 739, and Van Wycke v. Knevals, 106 U. S. 360, which were actions affecting the title to land granted by the United States, where it was claimed that the conditions of the grant had been departed from, and strangers to the title attempted to set up the defeasance.

The plaintiff in error here, before the bringing of this suit, brought an action in the Circuit Court of the United States for the Western District of Oklahoma, against the Governor and other officers of the state, seeking to enjoin them from removing their offices. It was tried before Campbell, District Judge, who filed a written opinion in the case on the 23d day of June, 1910, which has not been reported.

Speaking of this feature of the case Judge Campbell said:

> "Putting aside for the present any consideration as to whether or not it was competent for Congress to require as one of the conditions of admission into the Union that the State should maintain its capital at Guthrie for the period named, and assuming that the requirement as to the temporary location of the capital was one of the conditions contemplated in the ordinance above quoted, then the authorities are uniform that this was a compact or contract entered into between the United States and the people of the proposed state of Oklahoma that the capital should not be removed from Guthrie until after 1913.
>
> "The question then arises what rights, if any, flow to complainant from this compact or contract between the United States and the people of the proposed state of Oklahoma. Individually he was not a party to this contract. The allegations show that he was a resident of the Territory of Oklahoma at the time the constitution was framed and adopted. Therefore, as a citizen of the United States he was interested equally with every other citizen of the United States in whatever purposes or reasons impelled Congress to exact this condition with regard to the capital, and as a prospective citizen of the future state of Oklahoma he was interested equally with every other prospective citizen of the said state in whatever consideration influenced the constitutional convention representing the people of the proposed state in accepting this condition. But whatever interest he has in common with every other citizen of the United States on the one hand, or of the prospective state on the other hand, the two contracting parties, in its continued observance inviolable, can only be asserted by the sovereignty of which he is a constituent part. Can he be said to enjoy justifiable (sic) rights

> flowing from this compact or contract other than those which he enjoys in common with every other citizen?"

The effect of this case counsel will seek to avoid by citing the court to Section 1 of the Act of December 7, 1911, which he prints in his brief, the said Act giving to the Supreme Court of the State of Oklahoma, exclusive original jurisdiction to hear and determine any action brought involving the legality of the removal of the Capital, and providing that any resident taxpayer of the State shall have the right to a hearing.

It is immaterial to this court whether such a statute under the laws of Oklahoma in an action pending in the State of Oklahoma, vests a citizen of that state with the right to inquire into the consequence of a compact between the state and the United States. It is immaterial here whether that Act was constitutional or not, and whether this question was raised or not. The question here is, how can such an Act vest one with a federal right? If he has not a federal right without that act, he is without the right altogether.

A case representing the point I have in mind is

> Muskrat v. United States and,
> Brown and Gritts v. United States, 31 Sup. Ct. Rep. 250,

decided this term, which was an act attempting to give to the court of claims the jurisdiction to hear and determine

the validity of what is commonly known as the McCumber Act, removing restrictions from the lands of Indians in what was formerly the Indian Territory.

This court held that such an act could not confer the right to appeal to this court. The court said that the act was nothing but an attempt to provide for a final judicial determination in the Supreme Court of the constitutional validity of congressional legislation, without a "case" or "controversy" to which, under the Federal Constitution, the judicial power alone extends.

So here, there is no "case" or "controversy" in which Mr. Coyle is interested as a party, which he can appeal, or of which the Federal Court can take cognizance.

While the decision in the Muskrat case is so recent, yet, these words of Mr. Justice Day at page 255, ought to be reiterated here:

> "'This attempt to obtain a judicial declaration of the validity of the act of Congress is not presented in a 'case' or 'controversy,' to which, under the Constitution of the United States, the judicial power alone extends. It is true the United States is made a defendant to this action, but it has no interest adverse to the claimants. The object is not to assert a property right as against the government, or to demand compensation for alleged wrongs because of action upon its part. The whole purpose of the law is to determine the constitutional validity of this class of legislation, in a suit not arising between parties concerning a property right necessarily involved in the decision in question, but in a proceeding against

the government in its sovereign capacity, and concerning which the only judgment required is to settle the doubtful character of the legislation in question. Such judgment will not conclude private parties, when actual litigation brings to the court the question of the constitutionality of such legislation. In a legal sense the judgment could not be executed, and amounts in fact to no more than an expression of opinion upon the validity of the acts in question. Confining the jurisdiction of this court within the limitations conferred by the Constitution, which the court has hitherto been careful to observe, and whose boundaries it has refused to transcend, we think the Congress, in the act of March 1, 1907, exceeded the limitations of legislative authority, so far as it required of this court action not judicial in its nature within the meaning of the Constitution."

THE OKLAHOMA DECISION CAN REST ON THE WANT OF POWER IN THE CONVENTION TO CONSENT.

The rule is familiar that only when the decision in the state court cannot rest upon a non-federal ground sufficiently broad to support the judgment, may this court inquire into the correctness of the decision on any federal ground.

While it is true that in the opinion of the Oklahoma Court by Mr. Justice Williams, much is said of the right of the United States Congress to insert in the Enabling Act the

provision in regard to the location of the capital, yet, this court will bear in mind that it is the syllabus of the case which by law the Oklahoma court is commanded to prepare, which is the law of the case.

Section 6087, Compiled Laws of Oklahoma, 1909, Snyder, provides:

> "A syllabus of the points of law decided in any case in the Supreme Court shall be stated, in writing, by the judge delivering the opinion of the court, and filed with the papers of the case, which shall be confined to points of law arising from the facts in the case, that have been determined by the court; and the syllabus shall be submitted to the judges concurring therein, for revisal before filing thereof, and it shall be filed with the papers without alteration, unless by consent of the judges concurring therein; and a copy of such syllabus shall, in all cases be sent to the court below, by the clerk of the Supreme Court, with the mandate provided for by section 6085."

The syllabus in this case was as follows:

> "1. The action of the Governor in convoking the Legislature at, or adjourning it to, another place than the seat of government 'when in his opinion the public safety or welfare, or the safety or health of the members require it,' such convoking or adjournment having been separately concurred in by a two-thirds vote of all the members elected to each branch of the legislature, is conclusive upon, and not subject to be reviewed by, this court.
>
> "2. The Legislative Body, as convoked and constituted at an extraordinary session, assembling more than fifteen days after the date of the regular State

election held throughout the State in November, 1910, the House of Representatives being composed of the members elected at said election, and the Senate by the members elected at said election: Held, that said body was legally constituted.

"3. An Act entitled 'An Act providing for the permanent location of the Seat of Government and Capital of the State of Oklahoma, creating a Board of Capital Commissioners and Defining its Powers and Duties, Authorizing the Governor to Accept for Capital purposes the Proceeds of the Sale of Land, or Donations from other Sources, and Declaring an Emergency,' is neither a special nor a local law.

"4. The title of said act is not repugnant to section 57 of article 5 of the Constitution.

"5. When an enrolled bill has been signed by the speaker of the House and by the President of the Senate respectively, in the presence of those bodies immediately after the bill has been read publicly at length and the same has been approved by the Governor and deposited in the office of the Secretary of State, it is not competent to show from the journals of the House that the act so authenticated, approved and deposited, was not read on three different days in each house.

"6. Said act is not invalid on account of the provision of the enabling act requiring by irrevocable ordinance that the captial of the state shall temporarily be at the City of Guthrie, and not be changed therefrom previous to A. D. 1913, after which time it shall be located by the electors of said state at an election to be provided for by the legislature.

"7. It is within the power of the legislature to locate the capital of this state."

It will be seen that the judges who concurred in the opinion did not consider that one of the essential points of law raised in the case was the question of the validity of the act of Congress.

It will be noted that in the opinion it is stated that the state was without authority to assent to this provision in the Enabling Act.

Near the end of the opinion Mr. Justice Williams says:

"Neither Congress nor the Constitutional Convention had any power to bind the state irrevocably, by compact or otherwise, as to the location of its seat of government temporarily at the City of Guthrie, and not to be changed therefrom previous to Anno Domini, 1913, and after said year to be located by the electors of said state at an election to be provided for by the Legislature.

* * *

"As the irrevocable part of the compact at least falls, that is, that part of it wherein it seeks to irrevocably bind the state so that it cannot change the seat of government prior to 1913, nor thereafter except by a vote of the electors of the state at an election to be provided for by the Legislature, the question arises as to whether that part of the compact as a part of an ordinance passed by the convention temporarily fixing the seat of government, stands, and if so, what is its effect and how can it be repealed?"

Finally, about a page further on, he concludes:

"When the irrevocable part falls, that part of the ordinance, if any remains, is simply an ordinance in a legislative sense. At the time the Constitution was fin-

ally framed and submitted by the convention, its members were aware of the construction that had been placed on the term 'ordinance' in said enabling act by the court in Frantz et al. v. Autry et al., members of the convention being attorneys for the side procuring such holding.

"Practically all the provisions of the enabling act required to be agreed to or continued by compact by irrevocable ordinance, were incorporated in the Constitution. (See article 1, Federal Rel.; article 11, State & School Lands; sections 2, 26, 27, 28 and 36 of the Schedule; and paragraph relating to Osage County in section 8, article 17 of the Constitution.) Such provisions, except as they may be contracts inviolable, were then subject to amendment under the initiative and referendum provisions for the amending of the constitution, (Sec. 2, art. 5) and article 24 of the Constitution (Sec. 1, art. 2, Const.) Many provisions in the enabling act were required to be incorporated or provided for in the Constitution, as, for instance, the toleration of religious worship, prohibition as to manufacture, etc., of intoxicating liquor, the assumption of the debts of the Territory of Oklahoma by the State, public schools and the right of suffrage. (Sec. 3 of the enabling act). The fact that the Constitutional Convention incorporated into the Constitution provisions of the enabling act, other than those specifically required, and omitted that relative to the temporary location of the capital, is significant. And especially is this so, as the Convention accepting the terms of the amendments to the enabling act (Mar. 4, 1907), made the same a part of the Constitution, not accepting the same by ordinance. (Sec. 28 of the schedule)."

Further, in the opinion of Mr. Justice Turner in Smith Secretary of State, v. State, ex rel. Hepburn, not as yet re-

ported, in discussing the question of whether these provisions of the enabling act had binding force upon the state, he says:

> "It will not do to say that by thus adopting said provision, (that is, the provision of the enabling act adopted by the ordinance,) 'the capital of the State shall temporarily be at the city of Guthrie * * * and shall not be changed therefrom prior to 1913,' the right to change it prior thereto by act of the legislature was taken away from the State."

After discussing the other provisions of the Constitution charging Congress with notice of what was reserved by the people, and the cases from Missouri, Indiana and this court on such questions, finally Mr. Justice Turner says:

> "The inevitable conclusion to be drawn from this case is that should the state by charter, contract, compact or otherwise, part for a time with any of its governmental powers, or powers purely political, or municipal rights of sovereignty, that in as much as the same are held by it in trust for the people of the state, they are not the subject of contract and may be withdrawn or reclaimed at any time by the people of the state."

From this language it is claimed that the opinion of Mr. Justice Turner was that the people of the State were without authority to make an irrevocable contract.

The same clearly appears from the concurring opinion of Mr. Justice Hayes. He says:

> "I concur with my brother Associate Justice Turner in both his reasoning and conclusion upon the proposition that those provisions of the Enabling Act and of the Ordinance of the Constitutional Convention accept-

ing the terms of the Enabling Act which require that the capital of the State shall not be changed from Guthrie prior to the year 1913 are void, for the reason that it was not within the power of Congress to impose such condition upon the state, *nor within the power of the state to consent thereto.*"

And in the opinion of Mr. Justice Hayes concur Chief Justice Dunn and Mr. Justice Williams.

Upon the question that the state did not have authority to make such a compact all of the Justices concur, except Mr. Justice Kane. His opinion is that the state has made a compact and must stand by it.

It appears that the opinion of the Oklahoma Court rests as well upon the lack of authority in the constitutional convention to bind the state, as in lack of authority in Congress for that purpose. It thus appears that the opinion of the Oklahoma Court rests as well upon the lack of authority in the convention to bind the state as in lack of authority in Congress for that purpose. The lack of authority to bind the state is a nonfederal ground sufficiently broad upon which to rest the judgment. This court is not concerned whether that part of the opinion is correct, as it is a decision upon Oklahoma law.

"Where the highest court of a state having jurisdiction of a subject decides a Federal question in rendering a judgment, and also decides against the plaintiff in error upon an independent ground not involving a Federal question and broad enough to maintain the

judgment, the writ of error will be dismissed without considering the Federal question."

Jurisdiction and Procedure of the U. S. Supreme Court, Taylor, Sec. 240.

INTEREST OF THE PLAINTIFF IN ERROR IN CONTRACT NOT A JUSTICIABLE RIGHT.

This question was touched upon formerly from the point of view of whether the Oklahoma Act of December 7, 1911 could vest this court with jurisdiction in an appeal. I desire now to discuss the question from the point of view of whether the injury that the plaintiff might suffer would be such as would give him standing in court. Two cases directly in point are:

Slack et al. vs. Jacob et al., 8 W. Va. 612;
Edwards vs. Lesueur, 132 Mo. 140, 31 L. R. A. 815.

These two cases, both of them, are upon the very question of the removal of a state capital.

In the West Virginia case it was claimed the act of removal was unconstitutional and void, and in that of Missouri it was claimed the removal was void because of the compact made with the United States.

In both cases the courts held that such matters did not give a justiciable right to a taxpayer or other citizen.

While not upon exactly the same question yet closely analagous is the case of

Newton vs. Board County Commissioners, 100 U. S. 548.

In that case Mr. Justice Swayne, speaking for this court, in giving his reasons, said (page 560):

> "If a State capital were sought to be removed under the circumstances of this case with respect to the county seat, whatever the public exigencies, or the force of the public sentiment which demanded it, those interested, as are the plaintiffs in error, might, according to their argument, effectually forbid and prevent it; and this result could be brought about by means of a bill in equity and a perpetual injunction.
>
> "It is true a State cannot be sued without its consent, but this would be a small obstacle in the way of the assertion of so potent a right. Though the State cannot be sued, its officers, whose acts were illegal and void, may be * * *
>
> "A proposition leading to such consequences must be unsound."

Furthermore in the case of

Cherokee Nation vs. State of Georgia, 5 Pet. 1,

where an injunction was sought to prevent the execution of acts of the legislature of the State of Georgia in the territory of the Cherokee Nation of Indians, on the ground of

the federal right because of the control of Congress over the Indians. This court refused to take jurisdiction, and the great Chief Justice, speaking for the court said at page 20:

> "The mere question of right, might, perhaps, be decided by this court in a proper case, with proper parties. But the court is asked to do more than decide on the title. The bill requires us to control the legislature of Georgia and to restrain the exertion of its physical force. The propriety of such an interposition by the court may well be questioned. It savors too much of the exercise of political power to be within the proper province of the judicial department."

In the opinion of Mr. Justice Johnson at page 29 he cites the Nabob of Arcot's case in which the court of Great Britain refused to take jurisdiction because it had its origin in a treaty entered into between the sovereign states. A case he says, "in which the appeal is to the sword and to almighty justice and not to the courts of law and of equity. In the exercise of sovereign rights the sovereign is sole arbiter of his own justice. The penalty of wrong is war and subjugation." And further he says,

> "What these people may have a right to claim of the executive power is one thing; whether we are to be the instruments to compel another branch of the government to make good the stipulations of treaties, is a very different question. Courts of justice are properly excluded from all considerations of policy, and therefore, are very unfit instruments to control the action of that branch of government which may often be compelled, by

the highest considerations of public policy, to withhold even the exercise of a positive duty."

Mr. Justice Baldwin also was of the opinion that this was not a proper subject for judicial interference. Justices Thompson and Story dissented.

However, this case established the proposition that this tribunal was not concerned with political questions and would not interfere with the political arms of the government, the executive and the legislative.

In the next case of consequence the State of Georgia was upon the other side of the controversy. It is,

The State of Georgia vs. Stanton, 73 U. S. 50.

There a bill was filed by that state to enjoin the Secretary of War from carrying into execution certain acts of Congress on the ground that such execution would annul and totally abolish the existing state government of the state.

The bill averred that the State had real and personal property which would be destroyed by the carrying out of the acts of Congress, and this court held that though such were the case, yet it was not a proper one for judicial interference.

Speaking for the Court Mr. Justice Nelson, at page 77, said:

"It is true, the bill, in setting forth the political rights of the State, and of its people to be protected,

among other matters, avers, that Georgia owns certain real estate and buildings therein, State Capitol, and executive mansion, and other real and personal property; and that putting the acts of Congress into execution, and destroying the State, would deprive it of the possession and enjoyment of its property. But it is apparent, that this reference to property and statement concerning it, are only by way of showing one of the grievances resulting from the threatened destruction of the State, and in aggravation of it, not as a specific ground of relief."

He was of the opinion as was the whole court that it was without jurisdiction, although the particular grounds examined by Mr. Justice Nelson were not concurred in by the Chief Justice. Mr. Justice Nelson was of the opinion, that the relations existing between the United States and the State of Georgia were political matters and as such were not proper cognizance of judicial tribunals.

Louisiana vs. Jumel, 107 U. S. 711 was a case in which the legislature of Louisiana had taken up certain bonds by the issuance of other bonds, and thereafter had abrogated the machinery by which taxes should be collected to pay the bonds. It was agreed that the state had made a contract with the very parties who were suing, and the question was, could it be compelled to carry out the contract.

This court held in the McComb case,

Board of Liquidation vs. McCombs, 92 U. S. 531,

that its officers could be by mandamus compelled to perform the duties devolving upon them by existing law.

But in the later case, in the Jumel case, after the legislature had repealed the law this court held that there was no jurisdiction to compel the completion of the contract. So here, after the legislature of Oklahoma has repealed the law, the means of carrying out the contract are gone.

It will also be noted that in the Louisiana case the parties who sued were the persons with whom the contract had been made directly and not as Coyle in this case, whose rights are the same as any other citizen.

And further in the case of,

Luther vs. Borden, 7 How., at page 46:

"That according to the institution of this country the sovereignty in every state resides in the people of the state, and they may alter and change the form of government at their own pleasure. But whether they have changed it or not by abolishing an old government, and establishing a new one in its place, is a question to be settled by the political power. And when that power has decided, the courts are bound to take notice of its decision, and to follow it."

It is urged that these decisions conclude this court at this time upon the principle of *stare decises*—upon the determination that Coyle has no right that a court of justice may hear and determine in this case.

WAS THE LOCATION OF THE CAPITAL WITHIN THE POWER OF CONGRESS?

Upon the question of whether Congress had the power by the Enabling Act to locate the capital at Guthrie until 1913, the opinions of the Oklahoma court are so full that it would seem but a work of repetition to attempt to restate them. I refer specifically to the opinions in this case below, W. H. Coyle vs. Thomas P. Smith et al, decided February 16, 1911, and also to the opinion in the case of Thomas P. Smith et al vs. State, ex rel, Hepburn County Attorney, handed down November 15, 1910, unreported.

In addition to the authorities contained there I desire especially to call the attention of the court to Kentucky vs. Dennison, 24 How. 66.

Certainly the duty resting upon a governor by law of the United States and of a state is as solemn as any obligation growing out of so-called compact. If the courts cannot enforce one, neither can they the other. If they cannot enforce one by mandamus they cannot prevent the other by injunction.

STATE GOVERNMENTAL MATTERS NOT CONTROLLED BY CONTRACTS i. e., OUTSIDE AGENCIES.

See Butler vs Pennsylanvia, 10, How 402 wherein, by an Act of 1838, the state passed a law directing the governor to appoint canal commissioners and fixing their per diem. In 1843 another act was passed reducing their per diem.

It was decided that there was no contract between the state and the commissioners within the meaning of the constitution of the United States. Mr. Justice Daniel, speaking for the court, said, page 415:

> "The states of this Union consistently with their original sovereign capacity, could recognize no power to control either their rights or obligations, beyond their own sense of duty or the dictates of natural or or national law * * * "

And that it would be an abuse of power to attempt to regulate them in their internal and exclusive policy, and that in governmental matters there existed no private right.

See the other cases, such as Crenshaw vs. United State, 134 U. S. 99, and

Wilson vs. North Carolina, 169 U. S. 586.

Holding that appointments are not matters of contract and this because the state must not be held to bind itself as to governmental functions.

Finally, it will appear to be almost an offense against common sense to say that the location of a state capital was not purely and simply a state affair. The location of the state capital being so purely a question of govern. ment, even fundamental government—the very attitude. pomp and show of government—not the Government of the United States but of the State, that it would appear that the first of all things that the state should have the right to control would be where it would exercise its government, and how it should control its taxes for that exercise.

It seems inconceivable that this court could decide that the location of a state capital was not a matter of purely state concern. The recent decisions of this court have been so clear as to the division of domain and sway between the United States and the States that we have every confidence that nothing need be added to the opinion of the Oklahoma court, and the authorities therein named, exemplifying the right of the State and not of the United States to decide this question for the State. The legislative power of Congress does not include all power of a legislative kind not expressly entrusted to the states. The

judicial power of the federal courts is all enfolding. But the powers of Congress are enumerated.

Kansas v. Colorado, 203 U. S. 46, at p. 81, et seq.

We think the appeal should be dismissed or the judgment affirmed.

Respectfully submitted,

CHAS WEST,

Attorney General of Oklahoma,

For defendants in error.